INDEX

THE FOLLOWING MATERIALS FROM THE RECORD APPEAR HEREINAFTER IN LOGICAL SEQUENCE:

Docket Entries in CA-3-3690-B

DATE	PROCEEDINGS
1970	
Mar. 3	Filed Plaintiff's Original Complaint and issued Summons.
Mar. 16	Filed Return on Summons executed 3-3-70 by serving District Attorney of Dallas by delivering to Henry Wade. (MD-19900)
Mar. 18	Filed Order designating Judges Hughes, Taylor & Goldberg.
Mar. 19	Filed Application for Intervention of James Hubert Hallford, M.D.
Mar. 23	Filed Order granting James Hubert Hallford's Application for Intervention. (Signed Mar. 20, 1970) Notices mailed 3-24-70.
Mar. 23	Filed Intervenor and Plaintiff Hallford's Original Complaint.
Mar. 23	Filed Defendant's Original Answer.
Mar. 26	Filed Defendant's Answer to Intervenor Hallford's Original Complaint.
Mar. 27	Filed Notice to Take Deposition of Jane Roe, April 11, 1970 at the office of the District Attorney of Dallas County, Tex.
Apr. 13	Filed Brief of Pltf., James Hubert Hallford, M.D.
Apr. 20	Filed plf's Hallford Motion for summary judgment & Affidavit of James Hubert Hallford, M.D.

DATE	PROCEEDINGS
1970	
Apr. 22	Filed Pltf's First Amended Complaint
Apr. 22	Filed Defendant's Demand for Jury Trial.
Apr. 23	Filed plaintiff's Brief.
Apr. 30	Filed by State of Texas, Motion to Dismiss or in the alternative Motion for judgment on the pleadings pursuant to Rule 12.
May 18	Filed Deft's Brief.
May 18	Filed Request for leave to file Amicus Curiae brief by Dallas Legal Services.
May 20	Filed by plf Dr. James H. Hallford, Reply Brief.
May 21	Filed Plaintiffs' Motion for Summary Judgment. Affidavits of Dr. Trickett and Jane Roe are attached.
June 17	Filed Opinion of the Three Judge Court. Copies mailed to all counsel
June 17	Filed Judgment, the complaint of John & Mary Doe is dismissed; the Texas Abortion Laws are declared void on their face for unconstitutional overbreath & for vagueness. Plf's application for injunction is dismissed. Copies mailed to all counsel by Mrs. Graul.
July 10	Filed Deft's Notice of Appeal. (Wade is notifying other parties) (Copy of all sent to Crt of Appeals)
July 23	Filed Intervenor's Notice of Appeal. (atty. is notifying other parties) (copy sent to Court of Appeals)

DATE	PROCEEDINGS
1970	
July 24	Filed Jane Roe's Notice of Appeal (copy sent to Crt. of Appeals, and attny. notifying other parties)
July 30	Filed Transcript of Proceedings held May 22, 1970.
Aug. 5	Mailed original record with Transcript to Court of Appeals.
Aug. 17	Filed Notice of Appeal to the Supreme Court of the U.S. by State of Texas
Aug. 17	Filed Notice of Appeal to the Supreme Court of the U.S. by the Intervenor
Oct. 29	Filed certified copy of Order from Court of Appeals Granting appellees' motion to hold appeal in abeyance pending decision of the U.S. Supreme Court.

Docket Entries in CA-3-3691-C

DATE	PROCEEDINGS
1970	
Mar. 3	Filed Plaintiffs' Original Complaint and issued Summons.
Mar. 16	Filed Return on Summons executed 3-3-70 by serving Henry Wade, District Attorney of Dallas Co. (MD-19901)
Mar. 24	Filed Defendant's Motion to Dismiss for failure to present an actual, justifiable controversy.
Mar. 24	Filed Brief in Support of Defendant's Motion to Dismiss.
Mar. 30	Filed Order designating Judge Taylor (*sic* [Hughes]) and Judge Goldberg as members of 3 Judge Court with Judge Taylor.
Apr. 20	Filed in CA 3-3690, by plf Hallford, Motion for summary judgment and Affidavit of James Hubert Hallford, M. D.
Apr. 22	Filed Pltfs' First Amended Complaint
Apr. 22	Filed Defendant's Demand for Jury Trial.
Apr. 23	Filed in CA 3-3690, plaintiffs Brief
May 18	Filed in CA-3-3690, deft's Brief.
June 17	Filed Copy of opinion of the Three Judge Court.
June 17	Filed Judgment, the complaint of John & Mary Doe is dismissed; the Texas Abortion Laws are declared void on their face for unconstitutional

DATE	PROCEEDINGS
1970	
	overbreath & for vagueness. Plf's application for injunction is dismissed. Copies mailed to all counsel by Mrs. Graul.

[The original complaints of Jane Roe, John Doe, and Mary Doe are not included in this printed Appendix, but may be found with the certified record.]

Order by Chief Judge of the United States Court of Appeals for the Fifth Circuit, Convening a Statutory Three-Judge Court in CA-3-3690-B, Filed March 18, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

Civil Action No. 3-3690-B

JANE ROE,

—v.—

HENRY WADE.

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(1) Requesting Judge: Honorable SARAH T. HUGHES, Northern District of Texas.

(2) District Judge: Honorable W. M. TAYLOR, Northern District of Texas.

(3) Circuit Judge: Honorable IRVING L. GOLDBERG.

(4) Date of Order: 3-16-70.

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and

District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate. See Jackson v. Choate, 5 Cir., 1968, 404 F.2d 910, Jackson v. Department of Public Welfare of the State of Florida, S.D. Fla., 1968, 296 F.Supp. 1341; City of Gainesville, Georgia v. Southern Railway Company, N.D. Ga., 1969, 296 F.Supp. 763; Smith v. Ladner, S.D. Miss., 1966, 260 F.Supp. 918; Hargrave v. McKinney, M.D. Fla., 1969, 302 F.2d 1381; Langford v. Barlow [No. 26770], 5 Cir., 1969, 417 F.2d 628, Langford v. Barlow, W.D. Tex., 1969, 304 F.Supp. 657.

JOHN R. BROWN
Chief Judge
Fifth Circuit

Order by Chief Judge of the United States Court of Appeals for the Fifth Circuit, Convening a Statutory Three-Judge Court in CA-3-3691-C, Filed March 30, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

No. 3-3691-C

JOHN DOE and MARY DOE,

—v.—

HENRY WADE, District Attorney of Dallas County.

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(1) Requesting Judge: Honorable W. M. TAYLOR, JR., Northern District of Texas.

(2) District Judge: Honorable SARAH T. HUGHES, Northern District of Texas.

(3) Circuit Judge: Honorable IRVING L. GOLDBERG.

(4) Date of Order: March 26, 1970.

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and

District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate. See Jackson v. Choate, 5 Cir., 1968, 404 F.2d 910, Jackson v. Department of Public Welfare of the State of Florida, S.D. Fla., 1968, 296 F.Supp. 1341; City of Gainesville, Georgia v. Southern Railway Company, N.D. Ga., 1969, 296 F.Supp. 763; Smith v. Ladner, S.D. Miss., 1966, 260 F.Supp. 918; Hargrave v. McKinney, M.D. Fla., 1969, 302 F.2d 1381; Langford v. Barlow [No. 26770], 5 Cir., 1969, 417 F.2d 628, Langford v. Barlow, W.D. Tex., 1969, 304 F.Supp. 657.

JOHN R. BROWN
Chief Judge
Fifth Circuit

Plaintiffs' First Amended Complaint in *Roe* v. *Wade*, CA-3-3690-B (N.D. Tex., Filed Apr. 22, 1970)

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3690

JANE ROE, suing on behalf of herself and all others similarly situated,

Plaintiff,

—v.—

HENRY WADE, District Attorney of Dallas County,

Defendant.

I. PARTIES

1. Plaintiff, Jane Roe, is a citizen of the State of Texas, and a resident of Dallas County.

2. Defendant Henry Wade is the District Attorney of Dallas County, Texas, charged with the enforcement and administration of the criminal laws of the State of Texas in Dallas County.

II. JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth

Amendments to the United States Constitution; and under Title 28, United States Code, Sections 1331 and 1343, 2201 and 2202, and 2281 and 2284; Title 42 United States Code, Section 1983.

2. Plaintiff seeks (a) a declaratory judgment that Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code (hereinafter sometimes collectively referred to as the Texas Abortion Laws) are unconstitutional on their face; and (b) a permanent injunction against the future enforcement of these statutes.

III. Facts

1. Plaintiff, Jane Roe, is an unmarried pregnant woman.

2. Because of the economic hardships and social stigmas involved in bearing an illegitimate child, Plaintiff wishes to terminate her pregnancy by means of an operation, generally referred to as an abortion (within the meaning of Article 1191 of the Texas Penal Code), performed by a competent, licensed physician, under safe, clinical conditions.

3. Plaintiff's life does not appear to be threatened by the continuation of her pregnancy.

4. Plaintiff has been unable to secure a legal abortion in Dallas County because of the existence of the Texas Abortion Laws.

5. Her inability to obtain an abortion has caused Plaintiff to suffer emotional trauma.

6. Plaintiff cannot afford to travel to another jurisdiction to seek to secure a legal abortion under safe, clinical conditions.

7. An abortion performed by a competent, licensed physician, under hospital or clinic conditions is a safe and simple procedure which presents less danger to the pregnant woman, particularly in the first trimester of pregnancy, than ordinary childbirth.

8. An abortion performed outside of the clinical setting by unqualified personnel is extremely dangerous and often results in death, maiming, sterility, or serious infection.

9. This is a proper case to be heard by a Three-Judge Court in that Plaintiff is challenging State statutes as invalid on their face under the United States Constitution, and is seeking an injunction against the enforcement of the statutes.

10. Plaintiff sues on behalf of herself and all other women who have sought, are seeking, or in the future will seek to obtain a legal, medically safe abortion but whose lives are not critically threatened by the pregnancy. The number of members of the class is large and joinder of all members is impractical; there are questions of law and fact common to each class; the claims of Plaintiff are typical of the claims of such class; and the named Plaintiff will fairly and adequately protect the interests of the class.

IV. Causes of Action

1. The Texas Abortion Laws are unconstitutionally vague and uncertain on their face.

2. Said statutes deprive women and their physicians of rights protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, in that the statutes are neither narrowly drawn nor supported by any overriding and compelling state interest.

(i) They infringe upon Plaintiff's right to safe and adequate medical advice pertaining to the decision of whether to carry a given pregnancy to term.

(ii) They deprive Plaintiff of the fundamental right of all women to choose whether and when to bear children.

(iii) They infringe upon Plaintiff's right to personal privacy.

(iv) They infringe upon Plaintiff's right to privacy in the physician-patient relationship.

3. Said statutes on their face infringe upon Plaintiff's right to life and liberty in violation of the Due Process Clause of the Fourteenth Amendment.

4. Said statutes on their face violate the First Amendment's prohibition against laws respecting an establishment of religion.

5. Said statutes on their face deny Plaintiff the equal protection of the laws.

V. Relief Requested

1. Plaintiff prays that a Three-Judge Court be convened to hear this cause.

2. Plaintiff prays that a declaratory judgment be issued holding the Texas Abortion Laws to be unconstitutional on their face.

3. Plaintiff further prays for a permanent injunction restraining Defendant, his agents, and successors from enforcing the challenged statutes, that costs be taxed against the Defendant and for such further relief, at law or in equity, as Plaintiff may be entitled to receive.

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Attorneys for Plaintiff

[Certification of service omitted in printing.]

Plaintiffs' First Amended Complaint in *Doe* v. *Wade*, CA-3-3691-C (N.D. Tex., Filed Apr. 22, 1970)

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3691

JOHN DOE and MARY DOE, suing on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY,

Defendant.

I. PARTIES

1. Plaintiffs, John and Mary Doe, are citizens of the State of Texas, and residents of Dallas County.

2. Defendant Henry Wade is the District Attorney of Dallas County, Texas, charged with the enforcement and administration of the criminal laws of the State of Texas in Dallas County.

II. JURISDICTION

1. Plaintiffs invoke the jurisdiction of this Court under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth

Amendments to the United States Constitution; and under Title 28, United States Code, Sections 1331 and 1343, 2201 and 2202, and 2281 and 2284; and Title 42, United States Code, Section 1983.

2. Plaintiffs seek (a) a declaratory judgment that Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code (hereinafter sometimes collectively referred to as the Texas Abortion Laws) are unconstitutional on their face; and (b) a permanent injunction against the future enforcement of these statutes.

III. Facts

1. Plaintiffs John and Mary Doe are a childless married couple.

2. Plaintiff Mary Doe is presently suffering from a neural-chemical disorder. Her physician has advised her to avoid pregnancy until such time as her condition has materially improved, (although a pregnancy at the present time would not present a serious risk to Mary Doe's life).

3. In view of the medical advice received from Mary Doe's physician, Plaintiffs feel that it is inadvisable for them to become parents unless and until Mary Doe's condition has improved. For other highly personal reasons Plaintiffs do not wish to become parents at any time in the near future.

4. Also pursuant to medical advice, Plaintiff Mary Doe has discontinued use of the most effective means of contraception, the birth control pill. Plaintiffs are now conscientiously practicing an alternative method of contracep-

tion, but understand that there is nevertheless a significant risk of contraceptive failure.

5. Plaintiffs fear that due to contraceptive failure, they may face the prospect of becoming parents before they are properly prepared to accept the responsibilities of parenthood and before Mary Doe is able to undergo pregnancy without suffering considerable harm to her health and well-being. In such event, Plaintiffs would want to terminate the pregnancy by means of an operation, generally referred to as an abortion (within the meaning of Article 1191 of the Texas Penal Code), performed by a competent, licensed physician, under safe, clinical conditions.

6. Plaintiffs could not at the present time obtain a legal abortion in Dallas County, or anywhere else in Texas, in view of the Texas Abortion Laws which appear to limit legal abortions to those performed under medical advice in order to preserve the mother's life.

7. Should Mary Doe become pregnant, Plaintiffs' only alternative in Texas to carrying an unwanted pregnancy to term would be to secure an illegal abortion. Plaintiffs fear that the latter alternative would expose Mary Doe to an unnecessarily high risk of death, maiming, sterility, or serious infection. In addition, Plaintiffs would thereby suffer the extreme humiliation of participating in a furtive act, declared by the Texas Legislature to be a felony offense. And John Doe might risk prosecution under Article 70 of the Texas Penal Code as an accomplice to the crime of abortion.

8. Should Mary Doe become pregnant and Plaintiffs decide to secure a legal abortion, Plaintiffs would be forced

to undergo the emotional trauma of contacting numerous persons to ascertain jurisdictions where they could meet the legal requirements, to contact a doctor or clinic at the expense of long distance calls to make arrangements for the operation, and to expend considerable sums in travel, etc. Further, by the time Plaintiffs ascertained the fact of pregnancy, made the medical arrangements, arranged for time off from work, and gathered the necessary funds, in all likelihood the first trimester of pregnancy would have passed and the operation would then involve considerably greater risk to Mary Doe's health and require a lengthier recuperation.

9. The possibility of having to choose between the above-mentioned alternatives is presently having a detrimental effect upon Plaintiffs' marital happiness.

10. Since the birth control methods available to plaintiffs involve a risk of pregnancy, the Texas Abortion Laws, by eliminating the possibility of obtaining an abortion with reasonable ease, force upon Plaintiffs the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy.

11. In addition, Plaintiffs want to actively participate in various organizations, the activities of which include the giving of advice and counseling to both married and unmarried pregnant women, including the giving of information to assist in securing abortions, if desired.

12. Plaintiffs fear that any participation on their part in the above-mentioned organizational activities might subject them to prosecution under either (a) Article 70 of the Texas Penal Code, as accomplices to the crime of Abortion;

or (b) Article 1628 of the Texas Penal Code for conspiring to commit the crime of abortion. Therefore, Plaintiffs have refrained from participating in these activities.

13. This is a proper case to be heard by a Three-Judge Court in that Plaintiffs are challenging State Statutes as invalid on their face under the United States Constitution, and are seeking an injunction against the enforcement of the statutes.

14. Plaintiffs sue on behalf of themselves and all couples similarly situated, where they would seek an abortion were the woman to become pregnant and where the pregnancy would not constitute a critical threat to the woman's life. The number of members of the class is large and joinder of all members is impractical; there are questions of law and fact common to each class; the overall claims of Plaintiffs are typical of the claims of the class; and the named Plaintiffs will fairly and adequately protect the interests of the class.

IV. Causes of Action

1. The Texas Abortion Laws are unconstitutionally vague and uncertain on their face.

2. Said statutes deprive plaintiffs and their physicians of rights protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments, in that the statutes are neither narrowly drawn nor supported by any overriding and compelling state interest.

(i) They infringe upon Plaintiffs' right to safe and adequate medical advice pertaining to the decision of whether to carry a given pregnancy to term.

(ii) They infringe upon Plaintiffs' right to choose whether and when to have children.

(iii) They infringe upon Plaintiffs' right to privacy in the physician-patient relationship.

(iv) They infringe upon Plaintiffs' right to personal and marital privacy.

3. Said statutes on their face infringe upon Mary Doe's right to life and liberty in violation of the Due Process Clause of the Fourteenth Amendment.

4. Said statutes on their face violate the First Amendment's prohibition against laws respecting an establishment of religion.

5. Said statutes on their face deny Plaintiffs the equal protection of the laws.

V. Relief Requested

1. Plaintiffs pray that a Three-Judge Court be convened to hear this cause.

2. Plaintiffs pray that a declaratory judgment be issued holding the Texas Abortion Laws to be unconstitutional on their face.

3. Plaintiffs further pray for a permanent injunction, restraining Defendant, his agents and successors from enforcing the challenged statutes; that costs be taxed against the Defendant; and for such further relief, at law or in equity, to which Plaintiffs may be entitled.

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Attorneys for Plaintiffs

[Certification of service omitted in printing.]

Plaintiff-Intervenor Hallford's Application for Leave to Intervene in *Roe* v. *Wade*, Filed March 19, 1970

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3690-B

JANE ROE,

Plaintiff,

—v.—

HENRY WADE, District Attorney of Dallas County,

Defendant.

To the Honorable Judges of Said Honorable Court:

COMES NOW James Hubert Hallford, M.D., a licensed physician under the laws of Texas since 1958, and moves for leave to intervene as plaintiff in this action, in order to assert the claim set forth in plaintiff's Hallford original complaint which is filed herein, on the ground that he fears prosecution under the Texas Abortion Laws (Articles 1191 thru 1196 of the Texas Penal Code) as he currently stands charged with violating said articles in the following causes now pending in the Criminal District Court of Dallas County, Texas to wit: the State of Texas vs. James H. Hallford No. C-69-5307-IH and the State of Texas vs.

James H. Hallford No. C-69-2524-H and he feels that the present plaintiff (and the plaintiff in Civil Action No. CA-3-3691-C) does not fairly and adequately protect the interest of himself and the class of people who are physicians, licensed to practice medicine under the laws of the State of Texas and who fear future prosecution under said statutes and the present plaintiff does not fairly and adequately protect the interest of the class of people who are his patients and the patients of other practicing physicians. James Hubert Hallford further prays for an order permitting him to adopt the complaint of plaintiff, Jane Roe, insofar as the allegations contained therein are applicable to himself, as his own with like effect, as if fully repeated.

Respectfully submitted,

JAMES HUBERT HALLFORD, M.D.

[Certificate of Service omitted in printing.]

Plaintiff-Intervenor Hallford's Original Complaint, Filed March 23, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3690-B

[TITLE OMITTED IN PRINTING]

I. PARTIES

1. Plaintiff, James Hubert Hallford, M.D., is a citizen of the State of Texas, and a resident of Dallas County, and is engaged in the active practice of medicine in the County of Dallas.

2. Defendant, Henry Wade, is the District Attorney of Dallas County, Texas, charged with enforcement and administration of the criminal laws of the State of Texas in Dallas County.

II. JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution; Title 28, U.S. Code, Sections 1331 and 1343; the Declaratory Judgment Act, Title 28, United States Code, Sections 2201 and 2202; the three-Judge Court Statute, Title 28, United

States Code, Sections 2281 and 2284; and Title 42, Section 1983.

2. Plaintiff seeks a declaratory judgment that Articles 1191, 1192, 1193, 1194, and particularly 1196 of the Texas Penal Code (hereinafter sometimes collectively referred to as the Texas Abortion Laws) are unconstitutional on their face; and a permanent injunction against the enforcement of these statutes. The plaintiff expressly reserves the right to apply for a temporary restraining order, in the future, under Title 28, United States Code, Section 2284, if such action is necessary to prevent irreparable damage to him.

III. Statutes

1. The provisions of the Texas Penal Code, concerning the laws of abortion, being Articles 1191 through 1196 provide for and read as follows:

> Article 1191—"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubted. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused. Acts 1907, p. 55."
>
> Article 1192—"Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice."

Article 1193—"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars."

Article 1194—"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

Article 1195—"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

Article 1196—"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

2. The above abortion laws do not define the meaning of "for the purpose of saving the life of the mother," nor the meaning of "an abortion procured or attempted by medical advice." Furthermore, the case law of the State of Texas as reflected in the opinions of the Texas Court of Criminal Appeals does not define the meaning of said phrases.

3. The abortion laws do not establish a formal administrative mechanism for interpreting and enforcing its provisions.

4. The abortion laws in effect create a presumption that any abortion performed by a licensed practicing medical

doctor is illegal and unlawful and the physician has the burden of proving the lawfulness of the abortion if he is arrested or charged with violating the Texas Abortion Laws. In this regard, there are no provisions in the Texas Abortion Laws which require the State to rebut any medical opinion justifying an abortion and a Judge or Jury may convict a defendant under the Texas Abortion Laws simply because they do not believe the testimony of the defendant and/or any other expert opinion offered on his behalf.

5. The Texas Abortion Laws do not elaborate on their applicability or lack of same to the common situation in which a patient seeks an abortion, such as psychiatric indications, cardiac complications, kidney disease, rape, German measles, contraceptive failure, genetic complications, gastrointestinal diseases, neurologic diseases, diabetes, pulmonary disease, cancer, exposure to radiation, and socio-economic conditions such as those encountered by parents who have neither the means nor the desire to have more children, but the wife is pregnant.

IV. Facts

1. A therapeutic abortion performed under hospital or clinic conditions is a safe and simple procedure which presents less danger to the pregnant woman, particularly in the first trimester of pregnancy, than ordinary childbirth.

2. An abortion performed outside of the clinical setting by unqualified personnel is extremely dangerous to a woman, and may result in death, maiming, sterility or serious infection.

3. The threat and uncertainty of the Texas Abortion Laws are a principal deterrent to physicians and patients which delimits the number of therapeutic hospital and clinical abortions.

4. The plaintiff is not able to treat his patients according to the high standards of medical practice because of the uncertainty, potential sweep, and application of the challenge laws.

5. Pregnant women patients thereupon seek abortion outside of the hospital and clinical setting, risking their lives and health.

6. Hospitals in Dallas County treat numerous cases each year of women who have had septic, incomplete, and badly bungled abortions at the hands of unqualified, often non-medical abortionists.

7. The plaintiff in his regular practice as a physician receives, on a frequent and recurring basis, appeals from pregnant women who desire a therapeutic abortion in safe hospital or clinical surroundings.

8. Plaintiff must, in each case, decide whether and how he can advise and treat these patients in light of their overall physiological, psychological, and other personal needs.

9. Plaintiff's prospective patients come within a wide variety of conditions, which have included in the past and will include in the future the following:

(a) Serious danger of death to the woman unless an abortion is performed within a short period of time;

(b) Serious danger of suicide;

(c) Possible danger of suicide;

(d) Uncertain danger of suicide;

(e) Pregnancy caused by rape or incest;

(f) Patient ill with cancer;

(g) Patient had been infected with German measles in early pregnancy and would not like to risk the danger that continued pregnancy would lead to a serious malformed and sick infant;

(h) Patient would prefer to postpone pregnancy to a later date for a wide variety of reasons, including contraceptive failure, extreme youth, and others;

(i) Uncertain danger of death to the woman unless an abortion is performed within a short period of time;

(j) Possible danger of death to the woman unless an abortion is performed within a short period of time.

10. Plaintiff is not able to ascertain in a vast majority of cases whether the challenge laws prohibit advice and medical treatment, because the statutes do not in any way correlate with the regular and recurring medical indications present in his patients.

11. Plaintiff is deterred, hindered, chilled, and hampered in advising and treating his patients as a direct consequence of the statutes involved.

12. There is no medical committee, administrative agency or any other group that the plaintiff can apply to for an approval to perform a therapeutic abortion so that

he can be sure that his patient comes within the medical exceptions to the Texas Abortion Law or whether or not he has complied with Article 1196 in performing an abortion.

13. If the plaintiff was not subject to the threat of the vague and sweeping statutes challenged here, the medical practice of the plaintiff and other similar situated would be better able to serve the health needs of large numbers of women who are also affected by the statutes.

14. The plaintiff in the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The State of Texas vs. James H. Hallford, No. C-69-5307-IH, and (2) The State of Texas vs. James H. Hallford, No. C-69-2524-H. In both cases the defendant is charged with abortion and the indictment does not allege that the defendant does not come under the protection of Article 1196 of the Texas Penal Code nor does the indictment set out any facts which would negate the exceptions provided by Article 1196 of the Texas Penal Code and under the laws of the State of Texas the defendant has the burden of proving that he comes under the vague, ambiguous and indefinite provisions of Article 1196 of the Texas Penal Code, and furthermore, under the laws of the State of Texas even if the defendant offers testimony from himself and other physicians that the alleged abortion comes under the exception set out by Article 1196, the Judge and/or Jury may simply disbelieve such testimony without any expert medical opinion being offered to the contrary and convict the defendant.

V. Causes of Action

1. The Texas Abortion Laws and in particular Article 1196 are unconstitutionally vague and uncertain on their face, and in violation of the specificity requirements of the Fourteenth Amendment to the United States Constitution.

2. Said laws, on their face and as applied, deprive plaintiff and his patients of the right to privacy in the physician-patient relationship, as protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

3. Said laws, on their face and as applied, deprive plaintiff of the right to practice medicine according to the highest standards of medical practice, as guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

4. Said laws, on their face and as applied, deprive plaintiff's patients of "the fundamental right of a woman to choose whether to bear children . . . " *People* v. *Belous,* 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), as protected by the Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

5. Said laws, on their face and as applied, infringe upon plaintiff's patients' right to safe and adequate medical advice and treatment pertaining to the decision of whether to carry a given pregnancy to term, in violation of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution.

6. Said laws, on their face and as applied, infringe upon the stated constitutional rights of plaintiff and his patients, because said rights are protected and fundamental, and no compelling or overriding justification can be offered for the potentially drastic sweep of the laws.

7. Said laws, on their face, and as applied, deprive plaintiff and his patients of the equal protection of the laws, by treating similarly situated classes differently with no compelling justification for classification.

8. Said laws, on their face and as applied, violate the First Amendment free speech guarantee in their broad and indiscriminate sweep which deters and chills discussion and advice pertaining to abortion.

9. Said laws, on their face and as applied, violate the First Amendment prohibition against laws respecting an establishment of religion, in that the challenged statutes have no independent and compelling secular justification.

10. Said laws violate the Eighth Amendment in that they operate to impose a cruel and unusual punishment upon women by forcing them to bear each child they conceive, regardless of other surrounding circumstances short of immediate and obvious death if an abortion is not performed.

11. The enforcement of the said laws places the physician and this plaintiff in a position of decision-making beset with such inherent possibility of bias and conflict of interest as to deprive the plaintiff and his patients of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

12. The abortion laws and in particular Article 1196 are unconstitutional in that they provide no exceptions or justifications for abortions performed by a licensed physician wherein the plaintiff's patients are suffering from any one of the following:

(a) Pregnancy caused by rape or incest;

(b) Pregnancy complicated by various physiological and psychological conditions;

(c) Patients infected with German measles in early pregnancy and would not like to risk the prospect of serious and permanent fetal deformatives;

(d) Patients being the victims of contraceptive failure and for other medical reasons than have been set out above, highly likely or in all probability likely to bear serious and permanent fetal deformatives;

(e) Patients who for psychological or physiological reasons are in some danger of death if an abortion is not performed but where the risk or immediacy of such is not so great that it can medically or legally be said that the abortion is "for the purpose of saving the life of the mother;"

13. The Texas Abortion Laws create a legal and factual presumption that any abortion performed by a licensed physician is unlawful and place upon the defendant physician the burden of showing privilege or a lawful abortion was performed and the presumption of guilt created by the Texas Abortion Laws is in violation of the laws and the Constitution of the United States of America.

14. The language in Article 1196 reciting that "nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother" is unconstitutionally vague and uncertain on its face and forbids the doing of an act in terms so vague that the plaintiff physician and others similarly situated must necessarily guess at its meaning and differ as to its application.

VI. Relief Requested

1. Plaintiff prays that a three-Judge Court be convened to hear this cause.

2. Plaintiff prays that a declaratory judgment be issued holding the Texas Abortion Laws to be unconstitutional on their face.

3. Plaintiff prays for a permanent injunction, restraining defendant, his agents, and successors, from enforcing the challenged statutes.

4. Plaintiff reserves the right to make application for and pray for an interlocutory injunction granting a temporary restraining order to prevent irreparable damage, i.e., the actual trial of the felony cases now pending against this plaintiff in the Criminal District Court of Dallas County, Texas, because such a trial would cause irreparable damage to the plaintiff.

5. The plaintiff further prays that costs be taxed against the defendant; and for such further relief, at law or in equity to which plaintiff may be entitled.

Respectfully submitted,

By Fred Bruner

By Roy L. Merrill, Jr.
Daugherty, Bruner, Lastelick
& Anderson
1130 Mercantile Bank Building
Dallas, Texas 75201 742-3941

Attorneys for Plaintiff

Order of District Court Granting Application for Leave to Intervene, Filed March 23, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CA-3-3690-B

[TITLE OMITTED IN PRINTING]

On the 20 day of March, 1970, came on to be heard in the above cause, the Application for Intervention filed by James Hubert Hallford, M.D., who fears future prosecution under the Texas Abortion Statutes (Articles 1191 thru 1196 of the Texas Penal Code) and,

IT IS, THEREFORE, ORDERED that said Applicant be allowed to intervene as plaintiff in this action.

Signed this the 20 day of March, 1970.

SARAH T. HUGHES
United States District Judge

Defendant Wade's Original Answer in *Roe* v. *Wade*, Filed March 23, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3690-B

[TITLE OMITTED IN PRINTING]

To the Honorable Judge of Said Court:

Now comes HENRY WADE, defendant in the above entitled and numbered cause, and makes this his answer herein, and would show the Court:

1.

Defendant is the Criminal District Attorney of Dallas County, Texas.

2.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the following averments in Plaintiff's Original Complaint:

a.) That plaintiff is an unmarried pregnant woman;

b.) That plaintiff wishes to terminate her pregnancy, if any;

c.) That plaintiff is under any economic hardship or social stigma;

d.) That plaintiff's life is not threatened by continuation of her pregnancy, if any;

e.) That plaintiff cannot secure a legal abortion in Dallas County, Texas;

f.) That plaintiff cannot afford to travel to another jurisdiction to secure an abortion;

g.) That an abortion under clinical conditions is safer than ordinary childbirth.

3.

Defendant denies that this is a proper case to be heard by a Three-Judge Court because plaintiff is without standing to maintain it, in that the statutes complained of operate only against persons who perform an abortion, not against pregnant women upon whom abortions are performed.

4.

Defendant denies that there is no state forum in which plaintiff's federal constitutional rights can be determined.

5.

Defendant denies that the statutes complained of are unconstitutionally vague and uncertain on their face.

6.

Defendant denies that the said statutes are unconstitutionally broad on their face for any of the reasons alleged in Plaintiff's Original Complaint.

7.

Defendant denies that the said statutes infringe upon plaintiff's right to life.

8.

Defendant denies that the said statutes violate the constitutional prohibition against laws respecting establishment of religion.

9.

Defendant denies that the said statutes deny plaintiff the equal protection of the law.

10.

Defendant affirmatively says that if plaintiff is in fact an unmarried pregnant woman she has assumed the risk attendant upon such condition.

WHEREFORE, defendant prays that all relief requested by plaintiff be denied, that this cause be dismissed for plaintiff's lack of standing to maintain it, and that defendant recover from plaintiff his costs in this behalf expended.

JOHN B. TOLLE
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202

[Certification of Service omitted in printing.]

Motion of Defendant Wade to Dismiss Complaint of John and Mary Doe, Filed March 24, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3691-C

JOHN DOE and MARY DOE,

Plaintiffs,

v.

HENRY WADE, District Attorney of Dallas County,

Defendant.

To the Honorable Judge of Said Court:

NOW COMES HENRY WADE, Criminal District Attorney of Dallas County, Texas, Defendant herein, and moves the Court to dismiss this action for the reason that plaintiffs have no standing to maintain their suit against this Defendant because of their failure to present an actual, justiciable controversy.

WHEREFORE, Defendant prays that all relief requested by plaintiffs be denied, that this cause be dismissed for

the foregoing reasons, and that Defendant recover from plaintiffs his costs in this behalf expended.

Respectfully submitted,

WILSON JOHNSTON
Assistant District Attorney
Dallas County, Texas
Attorney for Defendant,
Henry Wade

[Certificate of Service omitted in printing.]

Defendant Wade's Answer to Plaintiff-Intervenor Hallford's Original Complaint, Filed March 26, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3690-B

JANE ROE,

Plaintiff,

v.

HENRY WADE, District Attorney of Dallas County,

Defendant.

To the Honorable Judge of Said Court:

Now comes HENRY WADE, defendant in the above entitled and numbered cause, and makes this his answer to Intervenor Hallford's Original Complaint herein, and would show the Court:

1.

Defendant is the Criminal District Attorney of Dallas County, Texas.

2.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the following averments in Intervenor's Original Complaint:

a) That intervenor is a citizen of the State of Texas, or a resident of Dallas County, Texas;

b) That intervenor is licensed to practice medicine in the State of Texas, or that intervenor is engaged in the practice of medicine in Dallas County, Texas;

c) That a therapeutic abortion performed under clinical conditions presents less danger to the pregnant woman than ordinary childbirth;

d) That intervenor is not able to treat his patients, if any, according to the high standards of medical practice because of the Texas Abortion Laws;

e) That pregnant women thereupon seek abortions outside the hospital or clinical setting, risking their lives and health;

f) That hospitals in Dallas County treat women each year who have had septic or incomplete abortions at the hands of unqualified abortionists;

g) That intervenor, if he is a physician, in his regular practice, if any, receives frequent appeals from pregnant women who want an abortion;

h) That intervenor must decide whether and how he can treat these patients, if any;

i) That intervenor's patients, if any, come within the variety of conditions set out in paragraph 9, subparagraphs (a) through (j) on page 5 of Intervenor's Original Complaint;

j) That intervenor is not able to ascertain whether the challenged laws prohibit advice and medical treatment in a vast majority of cases, if any;

k) That intervenor is deterred, hindered, chilled, and hampered in advising and treating his patients, if any, as a direct consequence of the statutes involved;

l) That there is no medical committee or other group to which intervenor can turn for advice;

m) That intervenor would be better able to serve the health needs of large numbers of women but for the statutes of which he complains;

n) That intervenor is one and the same JAMES H. HALLFORD indicted in cause numbers C-69-2524-H and C-69-5307-IH in the Criminal District Court of Dallas County, Texas;

o) That intervenor fears future prosecution under the Texas Abortion Laws.

3.

Defendant denies that the statutes complained of are unconstitutionally vague and uncertain on their face, and in violation of the requirements of the Fourteenth Amendment.

4.

Defendant denies that the statutes complained of deprive intervenor and his patients, if any, of the right to privacy in the physician-patient relationship, without admitting the existence of any physician-patient privilege.

5.

Defendant denies that the said statutes deprive intervenor of the right to practice medicine according to the highest standards of medical practice, and denies that such

right is protected or guaranteed by the United States Constitution.

6.

Defendant denies that the said statutes deprive any pregnant woman of the "fundamental right to choose whether to bear children", and without admitting the existence of such right, defendant says that intervenor has no standing to assert it.

7.

Defendant denies that the statutes complained of deprive pregnant women of any of their constitutional rights, and says that intervenor has no standing to assert any of such rights.

8.

Defendant denies that the said statutes violate the First Amendment right of free speech or the prohibition against laws respecting the establishment of a religion.

9.

Defendant denies that the said statutes violate the Eighth Amendment prohibition against cruel and unusual punishment.

10.

Defendant denies that the said statutes deprive intervenor of the equal protection of the law.

11.

Defendant denies that the said statutes are unconstitutional for any of the reasons set forth in paragraphs 1 through 14, inclusive, on pages 7, 8, 9 and 10 of Intervenor's Original Complaint.

12.

Defendant denies that the said statutes are so threatening or uncertain as to constitute a principal deterrent to physicians and patients which delimits the number of therapeutic hospital and clinical abortions.

13.

Defendant denies that the said statutes create a presumption of guilt on the part of any person charged thereunder.

14.

Defendant says that if intervenor is in fact one and the same JAMES H. HALLFORD indicted in cause numbers C-69-2524-H and C-69-5307-IH in the Criminal District Court of Dallas County, Texas, his prayer for relief as to those criminal cases cannot be granted by this Court because of the provisions of 28 USC Sec. 2283.

WHEREFORE, defendant prays that intervenor be required to show by legal and competent evidence the truth of the matters of fact alleged in his Original Complaint, if he can, that all relief prayed for in said Original Complaint be denied, that this cause be dismissed because of intervenor's lack of standing to maintain it, and that defendant recover from intervenor his costs in this behalf expended.

Respectfully submitted,

JOHN B. TOLLE
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202
Attorney for Defendant,
Henry Wade

[Certification of Service omitted in printing.]

Motion of the State of Texas to Dismiss All Complaints, or in the Alternative for Judgment on the Pleadings, Filed April 30, 1970

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action Nos. 3-3690-B and 3-3691-C

JANE ROE, *et al.*,

Plaintiffs,

vs.

HENRY WADE, District Attorney of Dallas County,

Defendant.

To the Honorable Court:

COMES NOW the State of Texas, represented herein by Crawford C. Martin, the Attorney General of Texas, after leave of the Court having been first sought and obtained to respond to the Plaintiffs' and Intervenor's Complaints in the above-entitled actions, and by way of response makes its Motion to Dismiss said Complaint and for Judgment on the Pleadings pursuant to Rule 12, F.R.C.P., and would show unto the Court as follows:

I.

Plaintiffs and Intervenor have failed to state a claim upon which relief may be granted by this Court for the following reasons:

A. They have failed to show that they and members of the class they purport to represent have standing to bring these actions.

B. They have failed to raise a substantial Constitutional question.

C. They have failed to show irreparable injury and the absence of an adequate remedy at law.

D. Intervenor, James Hubert Hallford's, Complaint is barred by 28 U.S.C. 2283.

II.

In the alternative, if the Court should conclude that it can properly consider the constitutionality of the Texas statutes under attack by Plaintiffs and Intervenor, the State of Texas would make this Motion for Judgment on the pleadings pursuant to Rule 12(c), F.R.C.P. In support thereof, the State of Texas would respectfully show that Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code are constitutional on their face.

III.

The State of Texas requests this Court, under the provisions of Rule 12(c), F.R.C.P., to consider its Motion for Judgment on the pleadings of Plaintiffs and Intervenor

as a motion for summary judgment as provided in Rule 56, F.R.C.P.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant to the
Attorney General

ALFRED WALKER
Executive Assistant to the
Attorney General

ROBERT C. FLOWERS
Assistant Attorney General

By /s/ JAY FLOYD
Jay Floyd
Assistant Attorney General

Attorneys for the
State of Texas
Supreme Court Building
Austin, Texas 78701

[Notice of Motion and
Certificate of Service omitted in printing.]

Motion of Plaintiffs' Jane Roe, John Doe, and Mary Doe for Summary Judgment in *Roe* v. *Wade*, and *Doe* v. *Wade*, Filed May 21, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action Nos. CA-3-3690 and CA-3-3691

[TITLE OMITTED IN PRINTING]

Plaintiffs Jane Roe and John & Mary Doe, upon their first amended complaint heretofore filed, the stipulations if any heretofore or hereafter filed, the briefs of the above-named plaintiff and of plaintiff Hallford heretofore or hereafter filed, and the affidavits filed by any of the plaintiffs, move that summary judgment be granted for the plaintiffs, Jane Roe and John & Mary Doe, in accordance with the relief prayed for in their respective complaints.

Respectfully submitted,

LINDA N. COFFEE
2130 1st Nat'l Bk. Bldg.
Dallas, Texas 75202

SARAH WEDDINGTON
3710 Lawton
Austin, Texas 78731

Attorneys for Plaintiffs
Jane Roe & John and Mary Doe

[Certification of Service omitted in printing.]

Affidavit of Paul Carey Trickett, M.D., in Support of Plaintiffs' Motion for Summary Judgment in *Roe* v. *Wade*, and *Doe* v. *Wade*, Filed May 21, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action Nos. CA-3-3690 and CA-3-3691

[TITLE OMITTED IN PRINTING]

STATE OF TEXAS,
COUNTY OF TRAVIS.

BEFORE ME, the undersigned authority, on this day personally appeared PAUL CAREY TRICKETT, MD., to me well known, who, after being by me first duly sworn, did depose and say as follows:

My name is Paul Carey Trickett. I was born Oct. 13, 1922, in Brunswick, Ohio. I graduated from high school in Waterloo, New York, and attended college at DePauw University in Greencastle, Indiana and at Yale University in New Haven, Connecticut. I graduated from college in the class of 1944. I attended medical school at Long Island College of Medicine (now State University of New York Downstate) in Brooklyn, New York, and graduated in 1948. I served an internship at Stamford General Hospital, Stamford, Connecticut. I have done an Obstetrics and

Gynecology Residency and had Fellowships at St. Agnes Hospital in New York, Stamford General Hospital, Westover Air Force Base Hospital in Massachusetts, and Massachusetts General Hospital in Boston. I was in private obstetrics and gynecology practice in Lewes, Delaware from 1954-1959 and served as Clinical Director of Health Programs at Wayne State University in Detroit from 1959-1961. From 1961-1968 I was Director of the University Health Program at Tulane and taught as a member of the Obstetrics and Gynecology Department at Tulane Medical School, New Orleans. Since September 1, 1968 I have been Director of the Student Health Service, The University of Texas at Austin (Box 7339, University Station, Austin, Texas 78712). In addition to my administrative duties, I am also in charge of our gynecology clinic and see patients regularly.

Based upon my experience as a practicing physician, especially my practice in the field of obstetrics and gynecology, and on my previous medical studies and my continuing studies since graduation from medical school, it is my opinion that an abortion involves only minimal danger to the patient if it is performed early in the pregnancy (preferably during the first 6-10 weeks of pregnancy), if the woman has had an adequate medical examination, and if the procedure is done by a competent physician in a good medical setting. Certainly an abortion is no more dangerous than a diagnostic dilitation and curretage, a common, routine medical procedure, done under the same conditions for other reasons.

Many women who are Texas residents have told me that they wanted an abortion after learning that they were pregnant; those wanting to terminate unwanted pregnancies have included unmarried and married women. Tragi-

cally some of them have gone to great extremes to get the abortion done.

In my opinion, it would be conservative to estimate that we diagnose at least one pregnancy a day at the University of Texas Student Health Center; a majority of those women diagnosed to be pregnant desire an abortion.

I have seen numerous young ladies who have come in following an illegal abortion. From the things they have told me and from my findings upon medical examination, it is my opinion that a large number are getting very poor procedures, which cannot only threaten immediate life but can also lead to psychological and medical problems in later life. It is my opinion that obtaining an abortion under the present non-legal situation is extremely dangerous, and that doing so becomes increasingly dangerous when an unskilled individual performs the abortion. The possible results of a "bad abortion" include death, infection (which may lead to sterility or future ectopic pregnancies), and other medical conditions. It has been my experience that many psychological problems result from the brutality that the girl may experience, and that many girls go through psychological difficulties resulting from their knowledge that they are participating in illegal conduct when their general attitude is one of respect for the law.

Numerous reasons have been stated to me as the basis on which a particular patient desires an abortion. These include lack of marriage (certainly being pregnant is much more pressing to an unmarried girl with no desire to marry or no reasonable chance of marriage than it may be to a married woman), desire to avoid interruption of schooling, and frequency of pregnancy (especially as to married women). Many pregnant women who are students feel that they might be able to finish a current semester but would

have to drop out to have the baby and during the post-partum period and that they would be severely hindered by such in their academic pursuits. It has also been my experience that the rate of academic attrition is very high among those who do carry the pregnancy to term. Another reason women seek abortions is economic; many single women and many couples (especially where they are both in school or where the wife is working to put the husband through school) feel that they cannot afford to have a child.

It is my opinion that inability to find good methods of contraception is another cause of unwanted pregnancies. It has been my recent experience, especially since the last hearings in Washington, that both married and unmarried women who have been on the pill desire to use other methods of contraception, and that more women now hesitate to start taking the pill. This increases the problems in regard to contraception since other methods of contraception are 60-80 per cent effective for the most part and this leaves a 20-40 per cent risk of pregnancy, which is unsatisfactory for most women. The diaphragm is often used by women who wish to avoid or discontinue use of the pill, but a substantial human error factor is involved in use of the diaphragm; a diaphragm must be placed properly to be effective, and that requires a certain level of intelligence and care. The IUD (inter-uterine device) is generally unsatisfactory in women who have not had a prior pregnancy carried to term and there is a high rejection rate; also, some doctors are fearful of the IUD since we don't know what the chronic irritation of the uterus might lead to.

I refuse to do abortions, and the physicians I know refuse to do them, because I wouldn't willfully, knowingly break the law or jeopardize my standing in the medical society or in the community.

However, I do know many physicians who have told me that there are circumstances other than where necessary to preserve the life of the mother when they consider an abortion to be indicated. I know several physicians who would perform abortions if the procedure were legal and if it could be done under good medical circumstances for such reasons as valid medical reasons as to why the pregnancy shouldn't be allowed to continue (as conditions where pregnancy is detrimental to the health of the mother and conditions where the fetus is suspect as to being defective or deformed), valid psychological reasons as to why the pregnancy shouldn't be allowed to continue, economic reasons, rape and incest. I personally would perform abortions under limited circumstances if the procedure were legal and if I had access to the proper medical facilities.

PAUL C. TRICKETT, M.D.

[Jurat omitted in printing.]

Affidavit of Jane Roe in Support of Plaintiffs' Motion for Summary Judgment in *Roe* v. *Wade*, and *Doe* v. *Wade*, Filed May 21, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action Nos. CA-3-3690 and CA-3-3691

[TITLE OMITTED IN PRINTING]

STATE OF TEXAS,
COUNTY OF DALLAS, *ss.*:

BEFORE ME, the undersigned authority, on this day personally appeared , to me well known, who after being by me first duly sworn, did depose and say as follows:

(1) My name is , I am over the age of twenty-one and am fully competent to testify. I presently reside at in Dallas, Texas.

(2) On March 3, 1970 I filed a lawsuit in the United States District Court for the Northern District of Texas, Dallas Division, which cause is presently pending under cause No. CA-3-3690. I filed this suit under the fictitious name of Jane Roe for the following reasons:

(a) I am not married at the present time and have not been at any time in the past six years.

(b) Because of my pregnancy I have experienced extreme difficulty in securing employment of any kind. I feared the notoriety occasioned by the lawsuit would make it impossible for me to secure any employment in the near future and would severely limit my advancement in any employment which I might secure at some later date.

(c) I consider the decision of whether to bear a child a highly personal one and feel that the notoriety occasioned by the lawsuit would result in a gross invasion of my personal privacy.

(3) I was pregnant on March 3, 1970 and am still pregnant at this time. I am and have been otherwise in good health.

(4) At the time I filed the lawsuit I wanted to terminate my pregnancy by means of an abortion performed by a competent, licensed, physician under safe, clinical conditions. I wanted to terminate my pregnancy because of the economic hardship which pregnancy entailed and because of the social stigma attached to the bearing of illegitimate children in our society.

(5) I consider myself to be a law-abiding citizen and have never wanted to participate in an act deemed by the State of Texas to be a felony offense.

(6) It is my understanding that I cannot secure a legal abortion in Dallas County, Texas or any place else in Texas because there has never been any medical indications that my life was endangered by the continuation of my pregnancy.

(7) I have a tenth grade education and have never received any formal training which would prepare me for a well-paying job. Since my pregnancy I have experienced difficulty in securing any kind of employment. Each month I am barely able to make ends meet. Consequently I cannot afford to travel to another jurisdiction in order to secure a legal abortion.

(8) I understand that there are competent licensed physicians in Dallas County who do perform, apparently illegal abortions, but I have never been able to afford their services.

(9) I fear that my very life would be endangered if I submitted to an abortion which I could afford.

(10) I believe that the enforcement of the Texas Abortion Laws against licensed physicians has forced me into the dilemma of electing whether to bear an unwanted child or to risk my life by submitting to an abortion at the hands of unqualified personnel outside of clinical settings.

.....

alias Jane Roe

[Jurat omitted in printing.]

Motion of Plaintiff James Hubert Hallford, M.D., for Summary Judgment in *Roe* v. *Wade*, and *Doe* v. *Wade*, Filed April 20, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action Nos. 3-3690-B and 3-3691-C

[TITLE OMITTED IN PRINTING]

The Plaintiff, James Hubert Hallford, M.D., upon the intervenor and plaintiff Hallford's original complaint heretofore filed, the depositions if any heretofore or hereafter filed, the stipulations if any heretofore or hereafter filed, the briefs of all the plaintiffs heretofore and hereafter filed, and upon his affidavit in support for motion for summary judgment attached hereto, as well as all other affidavits if any filed by the other plaintiffs, moves that summary judgment be granted for the plaintiff, James Hubert Hallford, M.D., in accordance with the relief prayed for in his complaint.

Respectfully submitted,

By FRED BRUNER
Fred Bruner

By ROY L. MERRILL, JR.
Roy L. Merrill, Jr.

DAUGHERTY, BRUNER, LASTELICK
& ANDERSON
1130 Mercantile Bank Building
Dallas, Texas 75201—742-3941
Attorneys for Plaintiff
James Hubert Hallford, M.D.

[Certification of Service omitted in printing.]

Affidavit of Plaintiff-Intervenor James Hubert Hallford, M.D., in Support of Motion for Summary Judgment in *Roe* v. *Wade*, and *Doe* v. *Wade*, Filed April 20, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3690-B

JANE ROE,

Plaintiff,

vs.

HENRY WADE, District Attorney of Dallas County,

Defendant.

STATE OF TEXAS)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared JAMES HUBERT HALLFORD, M.D., to me well known, who, after being by me first duly sworn, did depose and say as follows:

My name is James Hubert Hallford. I was born in 1927 in Wichita Falls, Texas. I graduated from high school in Enid, Oklahoma, and went to Oklahoma Baptist University where I graduated in 1949. I later attended Southern Methodist University in Dallas, Texas, and I attended

medical school at University of Texas Southwestern Medical School in Dallas, Texas. I graduated from medical school in 1958 and served an internship at University of Oklahoma Hospital in Oklahoma City, Oklahoma. I am now and I have been licensed to practice medicine in Texas since 1958 and have been engaged in the practice of medicine in Dallas County since 1960.

I have been arrested several times for the felony offense of abortion and I now stand charged by indictment for the offense of abortion under the laws of the State of Texas in what I am informed by my attorneys are Cause Numbers C-69-5307-IH, styled State of Texas v. James Hubert Hallford, and Number C-69-2524-H, styled State of Texas v. James Hubert Hallford. I have appeared in Judge Chamberlain's Court in the Dallas County Courthouse in regard to these charges and I have been informed that my case is now currently set for trial for Monday, April 20, 1970.

Before I was arrested or indicted in regard to any of the different arrests for abortion, I was never contacted by any police officer, Assistant District Attorney, or any other representative of the State of Texas and questioned or told that I might be arrested for the offense of abortion. Furthermore, no one ever asked me if I ever performed an abortion to "save the life of the mother or woman involved," before I was arrested. In fact, so far as I know, at no time has any representative of the State of Texas or any police officer ever inquired concerning whether or not any alleged abortion was performed legally or whether or not I wish to submit any written report or report of any other physician that any alleged abortion was lawfully performed to "save the life of the mother".

Based upon my experience as a practicing physician in the general practice of medicine and on my previous medi-

cal studies and continuing studies since graduation from medical school, it is my opinion and there is little if any disagreement among other physicians that a therapeutic abortion performed under hospital or clinical conditions by a licensed physician is a safe and simple procedure which presents less danger to the life of the pregnant woman, particularly in the first trimester of pregnancy, than ordinary childbirth. Furthermore, in my opinion, a substantial percentage of physicians would agree that even in the second trimester of pregnancy, if there are no unusual complications, a therapeutic abortion performed under hospital or clinical conditions is as safe or safer than ordinary childbirth.

An abortion performed outside of clinical settings by an unqualified person is extremely dangerous to a woman, and may result in death, maiming, sterility, serious infection and emotional disorders.

In my opinion (and all or nearly all licensed physicians would agree) pregnant women seeking abortion outside the hospital and clinical setting risk their lives and health and hospitals in Dallas County treat numerous cases each year of women who have had septic, incomplete, and badly bungled abortions at the hands of themselves or of unqualified or non-medical abortionists. I would estimate that Parkland Hospital in Dallas County, Texas receives on the average at least three or four women a night with incomplete abortion medical problems usually secondary to treatment by non-medical personnel. When I was in medical school at Parkland Hospital in 1958, I know of my own personal knowledge that there was an average of approximately four or five such emergency patients a night and it is my understanding based on conversations

with other physicians that the number has increased significantly since that time or date.

In my practice as a physician I receive on a frequent and recurring basis appeals from pregnant women who desire a therapeutic abortion in safe hospital or clinical surroundings. Consequently, I must in each case decide whether or not and how I can advise and treat these patients in light of their overall physiological, psychological and other personal needs. My patients and/or prospective patients come within a wide variety of conditions which have included in the past and in all probability will include in the future the following:

A. Those who are in serious danger of immediate death unless an abortion is performed within a short period of time.

B. Serious danger of suicide.

C. Possible danger of suicide.

D. Uncertain or slight danger of suicide.

E. Pregnancy reportedly caused either by rape or incest.

F. Patients ill with cancer.

G. Patients who have been infected with German measles in early pregnancy and/or other infections which cause fatal deformity and consequential damage to the emotional health of the mother and who would not like to risk the danger that continued pregnancy would lead to a serious malformed and sick infant and/or the dangers involved in an emotional disorder.

H. Patients who would prefer to postpone pregnancy to a later date for a wide variety of reasons, includ-

ing contraceptive failure, extreme youth, emotional problems and problems connected with pending divorces, other family problems and those with other financial and marital stress type problems.

I. Patients with a possible danger of death to the woman unless an abortion is performed and/or will have serious complications at the time of delivery unless an abortion is performed.

J. Uncertain or slight danger of death to the woman unless an abortion is performed.

I am not able to ascertain (as a doctor or from other sources) in a vast majority of my cases whether or not the Texas Abortion laws prohibit advice and/or medical treatment and/or an abortion because the Texas Laws and the language of the Texas Laws do not in any way correlate with the regular and recurring medical indications present in my patients.

There is no medical committee, group of physicians, administrative agency or any other medical or legal group that I can apply to for approval to perform a therapeutic abortion so that I can decide whether or not my patient comes within the medical exception to the Texas Abortion Law. Furthermore, it has been my experience as a practicing physician that even in hospital settings where there is an obvious significant danger of loss of life to the mother if an abortion is not performed, it is impossible or extremely difficult to get a hospital committee to commit themselves as to the legality of an abortion and furthermore it is extremely difficult to get another physician to render an opinion whether or not an abortion is necessary to save the mother's life. It has been my experience that while other

physicians are willing to informally talk about the abortion laws and under what circumstances an abortion is legal and/or medically should be performed, it is extremely difficult to get another practicing physician to commit himself in writing as to whether or not an abortion is necessary to "save the mother's life". In my opinion, under such circumstances, physicians are generally concerned about criminal prosecution and more important they are concerned about censure by their colleagues and/or disciplined by the State Board of Medical Examiners.

The different hospitals in Dallas County, Texas that allow abortions within the hospital setting at all, generally have an "abortion committee" composed of physicians which must grant approval before an abortion can be performed within the hospital. At some of the hospitals, abortions are not allowed to be performed at all. Unless the pregnant woman is removed to a different setting where an abortion can be performed, regardless of her condition and whether or not she is obviously going to die if an abortion is not performed, the mother is simply allowed to die.

From my own personal experience I recall having a patient in one hospital within Dallas County that does allow abortions upon approval of the Abortion Committee and my patient was suffering from pernicious vomiting as a result of pregnancy and after the patient who originally weighed 110 pounds lost 30 pounds, I informed the patient as well as the family that she was going to die if an abortion was not performed. I applied for approval from the Abortion Committee and requested a specialist, being a gynecologist, to perform the abortion. After I requested the approval several times and a number of days had gone by and the patient's condition was steadily deteriorating, I informed the committee that we could wait no longer than 48 hours

on an opinion. The Abortion Committee still refused to render an opinion one way or the other and the family removed the patient from the hospital setting to secure an abortion elsewhere.

In my opinion as a practicing physician, it is extremely difficult in Dallas County to obtain a therapeutic abortion in a hospital setting because the physicians involved are in fear of criminal prosecution under the Texas Abortion Laws and consequential reprimands or disciplinary action by the Texas and County Medical Associations. If it were not for the Texas Abortion Laws I and other physicians would better be able to serve the serious health needs of large numbers of women who are directly affected by the Texas laws.

Although I am not an attorney and do not have any special knowledge of the criminal law, I, as well as other physicians, are generally aware that there are laws concerning accomplices and accessories and I have heard such legal terms as have other doctors, like "accessories before the fact" and "accessories after the fact" and such phrases as "aiding and abetting" and have heard of laws concerning acting together to perform a criminal act. Because of the Texas Abortion Laws and other such laws concerning criminal conduct, myself and other physicians are deterred, hindered, chilled, hampered and otherwise thwarted in advising and treating patients as a direct consequence of the Texas Abortion Laws. In this regard I have received numerous patients who have told me that they had tried to discuss abortion with other physicians but without success and I know that many of the doctors here in Dallas County absolutely refuse to even discuss the question of abortion with their patients. It is my opinion, as a physician, that a significant number of physicians in Dallas

County are quite frankly simply afraid to even discuss the subject matter with their patients because of the Texas Abortion Laws.

It is my opinion, as a practicing physician, that I and other doctors are not able to treat patients according to the highest standards of medical practice because of the uncertainty and broad potential sweep and application of the Texas Abortion Laws. Furthermore, a substantial number of physicians or experts in the field of gynecology and obstetrics also agree that the abortion laws in Texas (or similar abortion laws) should either be liberalized or abolished. A study or a poll conducted by the Texas Medical Association reported that approximately 90 percent of the physicians polled were in favor of abolishing or liberalizing the Texas Abortion Laws in different degrees.

It is my understanding, as a physician, and in my opinion other physicians understand that the Texas Abortion Laws prohibit an abortion unless the same is "performed on the basis of medical advice for the purpose of saving the life of the mother". I do not know of any publications by the Texas or Dallas County Medical Associations defining such language, if it is possible to medically define such language. To my knowledge (and I have been so informed by attorneys) there is no legal definition of such terminology within the case laws of the State of Texas. To my knowledge there are not any medical publications nor any legal publications that have defined "medical advice" as used in the abortion laws. I do not know whether or not this includes the medical advice of chiropractors, registered nurses, medical technicians, osteopaths, other M.D.'s or the opinions of any group that holds themselves out to practice medicine. I do not know whether or not the term medical advice includes the body of knowledge or medical opinion

of those licensed to practice medicine outside of the State of Texas or licensed to practice medicine in some other country other than the United States of America. I do not know whether or not under the Texas law I can rely on the opinion or advice of another practicing M.D. or even the advice of a specialist. Furthermore, I do not know of any publications medical or legal which state whether or not an abortion in Texas is legal if it is performed in good faith by a physician to "save the mother's life" or whether or not to defend myself in an abortion offense case, I would have to present objective medical evidence so that some, most, or all doctors of medicine would agree that the abortion in question was "for the purpose of saving the life of the mother".

I do not know of any medical or legal publications which have defined the term "life" particularly as used in abortion statutes. I do not know whether or not it simply means a continuation of neurological, respiratory and cardiac functions. Also, I do not know whether or not the term includes psychological or emotional stability. Furthermore, the term "life" is also susceptible to widely differing interpretation among doctors in that it is not clear whether or not it means immediate survival, probable survival for a period of days, weeks, months, years or whether or not "life" is equivalent to longevity. It is not clear whether or not a patient's "life" encompasses physical and mental "health" or her overall well being.

I do not know of any medical or legal publications which have defined the term "saving" as used in the Texas Abortion Laws. Physicians do not know whether or not the term simply means to keep alive and if so, for how long it means to keep alive. I and other physicians do not know whether or not the term means to keep free from harm or injury

or whether or not the term means to keep free from serious harm or serious injury and if it does mean serious injury, I do not know how serious the injury must be before the abortion would be legal for the purpose of "saving" the mother's life. Furthermore, in my opinion as a physician, it is difficult to define the term "saving" in the sense that it is not unusual for licensed, competent physicians to disagree as to the diagnosis and prognosis in particular patients including pregnant women.

Also, it is my opinion as a practicing physician that if the Texas Abortion Laws mean that an abortion must be performed in good faith and also be based upon a reasonable medical basis concerning the danger of death for the mother, it would be extremely difficult to define "reasonable" or "reasonable belief" since I do not know whether or not it means a belief shared by all, most, or more than half of the practicing physicians in Dallas County.

Based upon my past experience and training, it is also my opinion as a practicing physician that the other physicians and/or M.D.'s in Dallas County do not and could not agree upon the legal and/or medical meaning of the phrase "for the purpose of saving the life of the mother". From my personal experience I know that there are good honest differences of opinions among physicians as to the meaning of the Texas Abortion Laws. Furthermore, I know of my own personal knowledge that hospital abortion committees vary in their interpretations, decisions and opinions concerning the meaning of the phrase.

It is my opinion as a practicing physician that the Texas Abortion Laws as a matter of fact create a conflict of interest between physicians and their patients. Based on my own personal experience it is my belief that a significant number of physicians are extremely concerned about their

liability under criminal abortion laws and resulting professional standing to the detriment of their patients, in making decisions concerning whether or not an abortion should be performed and/or even advising the patient concerning abortion.

It has been my experience, as a practicing physician, that the pregnant women who come to me and raise the subject of an abortion have already made up their minds that they desire and are in fact going to obtain an abortion and they are primarily only concerned whether or not they can legally obtain an abortion and/or whether or not they can obtain full and adequate medical care.

From my experience and observations as a practicing physician, I know that patients who are wealthy or can afford to travel outside the State of Texas, can obtain an abortion under safe clinical conditions. However, the less fortunate or lower economic class of patients, as a general rule cannot obtain a legal abortion and consequently either must bear the child or seek an abortion outside of safe clinical settings. It was my experience while I was at Parkland Hospital that most of the emergency incomplete abortion patients were from a lower social economic class. To my knowledge there is no social agency or any group of physicians or hospitals in Dallas County which make any special effort to serve the needs of indigent pregnant women concerning abortions and/or to help counsel with or otherwise advise such class of people. Other than the possible exception of a private agency in Houston, I do not know of any such organization within the State of Texas or any other group that an indigent pregnant woman can turn to for advice, help and medical treatment concerning an abortion.

Attached to this affidavit are true and correct copies of the indictments pending against me at the present time in the Criminal District Court of Dallas County, Texas. Because I have been arrested several different times on different occasions for the felony offense of abortion and have been indicted and at the present time stand charged by indictment with the offense of abortion, I presently fear prosecution under the Texas Abortion Law and am in fear of future arrest for violating the Texas Abortion Laws for the reason that it is my understanding that in all of the cases previously filed against me and now pending against me, the State is alleging that I performed an abortion upon a woman who was at the time of the abortion a patient of mine.

It is my medical opinion, as a physician, that the Texas Abortion Laws prohibit me from practicing medicine according to the highest of medical standards and it is my medical opinion that the decision as to whether or not a woman should have an abortion, particularly in the first trimester of pregnancy, should strictly be a matter to be decided by the patient and her physician.

/s/ JAMES HUBERT HALLFORD, M.D.
James Hubert Hallford, M.D.

[Jurat omitted in printing.]

INDICTMENT ANNEXED TO AFFIDAVIT OF JAMES HUBERT HALLFORD, M.D.

2023 A

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, the Grand Jurors, good and lawful men of the County of Dallas and State of Texas, duly elected, tried, impaneled, sworn and charged to inquire of offenses committed within the body of the said County of Dallas, upon their oaths do present in and to the Criminal District Court No. 2, of Dallas County, at the July Term, A.D. 1969, of said Court that one James Hubert Hallford on or about the 12 day of September in the year of our Lord One Thousand Nine Hundred and 69 in the County and State aforesaid, did unlawfully, with the consent of Francis C. King, a pregnant woman, insert into the vagina and womb of the said Francis C. King, an instrument the exact nature and description of which is to the Grand Jurors unknown and which instrument was then and there calculated to produce an abortion and for the purpose and intent of producing an abortion, and did then and there by the use of such means unlawfully, knowingly, wilfully and designedly produce an abortion of the said woman and did then and there and thereby destroy the life of the fetus in the womb of said woman, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

/s/ WM. H. ESTES
Foreman of the Grand Jury.

HENRY WADE
Criminal District Attorney of
Dallas County, Texas.

INDICTMENT ANNEXED TO AFFIDAVIT OF JAMES HUBERT HALLFORD, M.D.

556 J

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, the Grand Jurors, good and lawful men of the County of Dallas and State of Texas, duly elected, tried, impaneled, sworn and charged to inquire of offenses committed within the body of the said County of Dallas, upon their oaths do present in and to the Criminal District Court No. of Dallas County, at the April Term, A.D. 1969, of said Court that one James Hubert Hallford on or about the 4 day of January in the year of our Lord One Thousand Nine Hundred and 69 in the County and State aforesaid, did then and there unlawfully, with the consent of Jane Wilhelm, a pregnant woman, insert into the vagina and womb of the said Jane Wilhelm, an instrument the exact nature and description of which is to the Grand Jurors unknown and which instrument was then and there calculated to produce an abortion and for the purpose and intent to producing an abortion, and did then and there by the use of such means unlawfully, knowingly, wilfully and designedly produce an abortion of the said woman and did then and there and thereby destroy the life of the fetus in the womb of said woman, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

/s/ HERBERT R. HOWARD
Foreman of the Grand Jury.

HENRY WADE
Criminal District Attorney of
Dallas County, Texas.

Transcript of Oral Argument Before Statutory Three-Judge United States District Court for the Northern District of Texas, Filed July 30, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CA NO. 3-3690-B

JANE ROE,

Plaintiff,

—v.—

HENRY WADE,

Defendant,

—v.—

JAMES HUBERT HALLFORD, M.D.,

Intervenor.

CA NO. 3-3691-C

JOHN DOE and MARY DOE,

Plaintiffs,

—v.—

HENRY WADE,

Defendant.

BE IT REMEMBERED that on the 22nd day of May 1970 at Dallas, Texas before the Honorable Irving Goldberg, Judge of Fifth Circuit Court of Appeals; the Honorable Sarah T. Hughes and the Honorable W. M. Taylor, Jr., U. S. District Court Judges, and without a Jury, the above styled and numbered cause came on for hearing as hereinafter shown:

Appearances:

MISS LINDA COFFEE, Dallas, Texas
and
MRS. SARAH WEDDINGTON, Austin, Texas
for the Plaintiffs

DAUGHERTY, BRUNER, LASTELICK & ANDERSON, Dallas, Texas

By: Mr. Fred Bruner
and
Mr. Roy L. Merrill, Jr.
for the Intervenor
Dr. James H. Hallford

OFFICE OF DISTRICT ATTORNEY HENRY WADE, Dallas, Texas

By: Mr. John Tolle
for the Defendant Wade

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS, Austin, Tex.

By: Mr. Jay Floyd
Mr. Ed Mason
For the Defendant Attorney General of Texas

PROCEEDINGS

Dallas, Texas
July 22, 1970

Judge Goldberg: Good afternoon. We have for hearing this afternoon the consolidated cases of ROE, et al versus WADE, 3690 and DOE, et al versus WADE, 3691. Have all the appearances been given to the court reporter?

Mr. Tolle: Yes, Your Honor.

Judge Goldberg: Is everyone ready?

Mr. Tolle: Defendant Wade is ready, Your Honor.

Mr. Bruner: We are ready, Your Honor, the Intervenor is ready.

Miss Coffee: Plaintiffs Doe and Roe are ready, Your Honor.

Judge Goldberg: Will there be any testimony in this case?

Mr. Tolle: No, Your Honor, for purposes of the record, we had previously filed a Motion for a Jury trial, and all facts that were to be in controversy, I think have been resolved by affidavits, and we at this time withdraw that Motion. We will have no evidence to present.

Miss Coffee: We have no evidence to present.

Judge Goldberg: The Intervenor?

Mr. Bruner: The Intervenor has no evidence, Your Honor.

Judge Goldberg: The Court will allocate half an hour to the side for the presentation of your arguments with respect to the Motion for Summary Judgment and the Motion to Dismiss. With that time allocation, we will now hear you. The Intervenor and the Plaintiffs should divide

their half hour. Your positions are the same, are they not, except with respect to standing?

Mr. Fred Bruner: Yes, Your Honor.

May it please the Court, we have agreed upon presentation of the matter before the Court, and ladies first, of course. There are several points to be taken up and we have agreed upon the points to be presented by the respective parties, and we will abide by the Courts' time.

Mr. Floyd: Your Honor, if the Court please, the State of Texas has responded to the Plaintiffs' and the Intervenor's Petitions. We don't know how the Court feels about the allocation of time between the State of Texas and the District Attorney.

Judge Goldberg: Can you divide your half hour?

Mr. Floyd: I think we can.

Judge Goldberg: Let's proceed then.

Miss Coffee: May it please the Court, I am Linda Coffee and I am the attorney representing the Plaintiffs Doe and Roe. We had agreed, my co-counsel and I, to divide up the argument in the following way: I will present the preliminary procedural points, and then my co-counsel, Sarah Weddington, will consider the merits for the Plaintiffs Doe and Roe. In view of the allotted time, I will not attempt to cover all the procedural issues raised for they are many and somewhat complex. I think I must concentrate on the question of whether this Court should abstain from rendering a Declaratory Judgment concerning the validity of the Texas Abortion Laws, and then the question of the propriety of injunctive relief, should they decide that the laws are unconstitutional.

I will first consider the question of declaratory relief. It is our position that the case of *Zwickler* versus *Koota* compels this Court to consider the constitutional question,

compels this Court to give a declaratory judgment concerning the validity of the Texas Abortion statute.

Judge Hughes: Why do you say that?

Miss Coffee: Because in this case the Plaintiffs are contending that there is no possible construction which the State Courts could put on the Texas Abortion Laws which would modify or remove the constitutional question. It could not at least modify all of the questions.

Perhaps the State Court could possibly render a decision explicating and making the statute somewhat less vague, but we are complaining of the statutes not only because they are vague but because they are overbroad. Our contention is that there is no conceivable construction which you can put on the Texas Abortion Laws which would remove the problem of their overbreadth. There is no construction whereby the Court could say Texas Abortion Laws permit abortion or do not punish abortion in the case of a woman who seeks an abortion because of contraceptive failure or because of simply economic reasons, and I would point out that *Zwickler* versus *Koota* is not limited to First Amendment rights, however, if the Court thinks it is important, we do feel that First Amendment rights are involved in our Plaintiffs' constitutional claims.

Judge Hughes: What First Amendment rights?

Miss Coffee: Well, the right of privacy. I think the case of *Stanley* versus *Georgia* clearly extended First Amendment protection to the right of privacy. I think this is clear from the language of the case. However, I don't think—as I said—*Zwickler* versus *Koota* no where indicates it is limited to First Amendment rights.

Judge Goldberg: *Zwickler* was a First Amendment case, wasn't it?

Miss Coffee: It did involve expression—First Amendment rights, however the statement in the case says, "This is especially so when First Amendment rights are involved", implying that the case has as much validity as when First Amendment rights are not involved.

Judge Goldberg: Do you make a distinction between the First Amendment and the Ninth Amendment with respect to perhaps enforcement even if there is no difference with respect to the declaration of unconstitutionality?

Miss Coffee: I think in some cases this may be justified. I don't think it makes any difference in our case because whether you say that the rights involved First Amendment rights or Ninth Amendment rights, I feel that they are so important that they deserve the special protection that has been accorded First Amendment rights. In other words they involve fundamental human freedom, which I think the recent cases have indicated are beginning to be given the same priority treatment that First Amendment rights have already been afforded.

Judge Goldberg: We have been cautioned, however, that we are only to do it in extra ordinary cases where it is liable to have a chilling effect upon First Amendment rights.

Miss Coffee: Well, as I understand, we're talking about injunctive relief now. As I understand it, the traditional rule is that the Courts will not enjoin State criminal proceedings or perhaps proceedings of any kind except in extra ordinary circumstances.

Judge Hughes: What extra ordinary circumstances are involved here? The State has not tried to prosecute unfairly, has it?

Miss Coffee: The State is prosecuting against physicians. I think when the State undertakes to prosecute

against physicians, naturally this will deter physicians from performing abortions even if they feel that in certain cases it's justified.

Judge Goldberg: Well, your position is then that any constitutional invasion of any constitutional right should be protected by an injunction?

Miss Coffee: Not any constitutional right.

Judge Goldberg: Well, where would and where wouldn't you?

Miss Coffee: All right, here's an illustration—where one individual is subjected to an unreasonable search and seizure. As in the present case, this does not really involve what we call public rights, this could be said to be an injury to this one particular individual, and this is not done pursuant to a State statute as in this case, where a State statute clearly authorizes the State to make these prosecutions.

And I think another point is that the members in Jane Roe's class do not have any adequate State remedy. There is no State forum available to the Plaintiff in Jane Roe's class.

Judge Goldberg: Yes, but the State of Texas might hold its statute unconstitutional or the Supreme Court of the United States could hold it unconstitutional when the State has held it constitutional. It's not defenseless.

Miss Coffee: Well, Jane Roe is not personally facing prosecution.

Judge Hughes: Could the Intervenor submit himself to the State Court?

Miss Coffee: He is already before the State Court, the Intervenor is already before the State Court.

Judge Hughes: But can he raise the question?

Miss Coffee: I suppose in his defense he can raise the interest of our Plaintiffs there, but I don't think it's fair to make our Plaintiffs' rights—to make their vindication of their rights be determined on what another class of persons raises.

Judge Goldberg: Do you think the entire statute should be stricken?

Miss Coffee: Yes.

Judge Goldberg: Completely?

Miss Coffee: Yes. I think the Court has no other choice because the scope is so entirely too broad. All the provisions just about are so vague, that I just don't think it's—

Judge Hughes: Suppose we struck out the provision saving the life of the mother in the last section of the law, wouldn't that make the statute constitutional? You would then have that section read, "Nothing in this Chapter applies to an abortion procured or attempted by medical advice."

Miss Coffee: The thing is—this was not the intent—if the Court should do this, then the Court would be rewriting the statute for the State. There is no indication that the State of Texas intended the statute to read that way.

Judge Goldberg: Do you know whether this statute was separable? Did it have a separability provision? When was it passed? When was the Abortion statute passed—1905?

Miss Coffee: I believe this statute was passed around 1919—it might be 1905, but the predecessor was passed in 1886, I am told.

Judge Goldberg: Do you know whether it has a separability provision?

Mr. Tolle: If the Court please, it's 1907, I think.

Judge Goldberg: Does it have a separability provision?

Miss Coffee: I don't know, Your Honor.

Judge Goldberg: Does anyone at the counsel table know?

Mr. Tolle: Not specifically. I believe there is a general provision in the Penal Code providing for separability. I think there is, Judge.

Miss Coffee: Is the Court worried about—

Judge Goldberg: We worry about a lot of things. Don't let that worry you.

Miss Coffee: I was going to suggest if the Court was concerned about there being any criminal sanction against a non-medical personnel performing abortions—

Judge Goldberg: Perhaps—may I suggest—we may be worried, I don't know—that if we struck it down completely, extricated the whole thing, anybody could perform an abortion any place—in a garage or in an attic or any other place? I know you're going to answer about the medical practice, and we'll get to that a little bit later.

Miss Coffee: All right, Your Honor.

In the case of *University Committee to End the War in Vietnam* versus *Dunn*, a court in Austin, a Three-Judge Federal Court in Austin struck down the Texas Breach of the Peace statute.

Judge Goldberg: Yes.

Miss Coffee: They struck down the whole statute, as I understand it, but they stayed the execution of an injunction until the next session of the Legislature out of a Special Order—

Judge Goldberg: You are suggesting we might do that here?

Miss Coffee: That's a possibility. I think the statute is so bad the Court is just really going to have to strike it all down. I don't think it's really worth salvaging. If the

Court made the relief which it mentioned, that would still read "pursuant to medical advice" and that would still be somewhat unclear. The Court would almost have to extricate "by medical advice", whether that's just limited to licensed practitioners of medicine or nurses or what it means. There's nothing in the statute.

Judge Goldberg: You think 63 years of unconstitutionality should have worn everyone's constitutional patience, is that what you're saying?

Miss Coffee: Yes, I think so. I think the State of Texas has had plenty of time to construe this statute, if it can be construed in a constitutional manner.

Judge Goldberg: You've used 13 minutes. Judge Hughes is our timekeeper. Thank you.

Mrs. Weddington: May it please the Court, my name is Sarah Weddington. Since I have very little time left, I would like to speak to two issues, the first being the justification which the State alleges for the State Abortion statute, i.e., the protection of the life of the child; and secondly, whether or not there are substantial constitutional issues involved as protected by the right to privacy.

Since the four recent cases which deal with the Abortion statute have unanimously recognized the right to privacy and have expanded on it to some extent, I would like first to turn to the problem of whether or not—

Judge Goldberg: What four cases are you talking about?

Mrs. Weddington: The four cases I'm talking about are *California* v. *Belous, U. S.* v. *Vuitch*—

Judge Goldberg: In the District of Columbia—you say that they held that the Ninth Amendment was involved—

Mrs. Weddington: I said that they have all recognized the right to privacy.

Judge Goldberg: I don't read *Vuitch* that way. I think it's stricken down on the basis that it was vague.

Mrs. Weddington: Excuse me—quoting from that Opinion—"There has been moreover an increasing indication in decisions of the Supreme Court of the United States that as a secular matter the woman's liberty and right of privacy extends to family, marriage, and sex matters, and may well include the right to remove an unwanted child at least in the early stages of pregnancy."

Judge Goldberg: You are reading from what, now?

Mrs. Weddington: *U. S.* v. *Vuitch*. Memorandum Opinion.

I'll be glad to show this to the Court.

Judge Goldberg: I have it.

Judge Hughes: We have it.

Judge Goldberg: We have it.

Mrs. Weddington: Would you like for me to quote further from this?

Judge Hughes: No, you go ahead.

Mrs. Weddington: I will refer to this question again later, if the Court would like.

The only justification which the State has advanced at this point for the justification for the statute is that of protecting what they term the life of the unborne child.

First, I would like to draw to the Courts' attention the fact that life is an ongoing process. It is almost impossible to define a point at which life begins or perhaps even at which life ends. Certainly life in its very general matter is present in the sperm, it's present in the ova. This potential of life depends on a set of circumstances which must then occur. This is a fact recognized by former Justice Clark in an article he wrote. "To say that life is present at conception is to give recognition to the potential rather

than the actual." The unfertilized egg has life and if fertilized it takes on human proportions.

Judge Goldberg: Assuming that there is a Ninth Amendment right here, I want to ask you to address yourself to the question—does the State have any compelling interest that could regulate or modify in any manner that right? Can they for example say that all abortions must be in a hospital or must be certified by one physician, four physicians or 22 physicians? Whether there should be different standards for abortion for married and unmarried people? Can there be a State compelling interest still recognizing the Ninth Amendment right?

Mrs. Weddington: So far as I can see any interest which the State would allege which could be compelling must be based on some sufficient justification. I can see, for example, sufficient justification for keeping a non-licensed medical person from doing the operation.

Judge Goldberg: You can see this?

Mrs. Weddington: There is a public health problem involved.

I cannot see any justification for regulating the abortion when it is done by a doctor.

Judge Goldberg: Whether it be married or unmarried?

Mrs. Weddington: That is true.

Judge Goldberg: Or the state of the pregnancy or anything?

Mrs. Weddington: The state of the pregnancy gives me some pause. I can see, for example, that you could, as I believe *Babbitz* did, say that this right exists only to the fourth month of pregnancy. To me a more persuasive argument is that you could recognize life when the fetus is able to live outside the body of the mother, which is approximately the 22nd or the 26th week of pregnancy.

I think a solution I would like to suggest to the Court is one which has come up in consideration of transplants, as to when death occurs. Instead of whether or not the heart is beating or there are bodily processes going on, the standard is more and more being adopted as to whether or not there are brain functions present as evidenced by EEG. I think this is an excellent way to determine whether or not the fetus has sufficient human characteristics that it should be given the recognition of a human life and protected as such.

So far the earliest that they have been able to get EEG readings on the fetus is about the seventh month of pregnancy.

Judge Hughes: Would you put that in the statute?

Mrs. Weddington: I think it could be used as a determination point. Certainly EEG is a very standard procedure. Doctors are all familiar with it and it could be something that could be easily done or proven that the brain function is evident.

Judge Goldberg: Do you think that the present statute, bad as you say it is, should show some compelling State interest on the part of the State to regulate some phase of this matter?

Mrs. Weddington: Not as it's written. It is so broad at the present time that it denies, or it covers so many women whom I believe under the Ninth Amendment, that those women have a right to abortion, which is denied them by this statute. I think you cannot make any valid distinction on whether or not she's married or unmarried, whether or not the child is conceived out of marriage—

Judge Goldberg: Not whether we can, but the Legislature could.

Mrs. Weddington: I don't believe the Legislature could make such a valid distinction under the distinctions.

Judge Hughes: Do you think that the State has a more compelling interest with reference to unmarried women than married women?

Mrs. Weddington: I do not. For example, at the present time a great many women who are pregnant and desire abortion are unmarried women. I don't believe it can be successfully argued that to enact a statute which would deny them abortion would in fact serve any State interest.

Judge Goldberg: Well, is there any relationship between promiscuity?

Mrs. Weddington: I don't believe there is.

Judge Goldberg: Is there any body of knowledge on the subject?

Mrs. Weddington: Not to my knowledge, other than the fact that they are already promiscuous when the statute is in effect, and in fact these are some of the girls who need this right and who have the most socially compelling arguments why they should be allowed abortions—the young, those still in school, those unable to shoulder the responsibility of a child—these girls should not be put through the pregnancy and should be entitled to an abortion.

Judge Goldberg: Are there any conditions under which the State has a compelling interest to prevent this—any, any situation that you can think of?

Mrs. Weddington: If the abortion is to be performed on a fetus which has been determined to have human life, which I would suggest would either be when brain waves are present or in the cases I suggested earlier, then I believe the State would have a valid right to regulate. Even then I do not believe the State has a valid right to regulate how it is done other than that it be done by a competent, licensed physician.

Judge Goldberg: Do you think if we struck the law down and there could be no indictments and no prosecutions for abortion and some of the abortions were taking place under conditions which you might even agree were unsanitary or unscientific conditions, what would be the situation then?

Mrs. Weddington: First of all, if it is an unlicensed medical personnel, there are remedies under the Penal Code for the practice of medicine.

Judge Goldberg: Do you know what they are? Do you know that it's just a fine and punishable by 30 days?

Mrs. Weddington: Yes.

Judge Goldberg: That's the limit of the punishment?

Mrs. Weddington: That's right, but if you had licensed personnel available and doing the operation, the girls would have the alternative of going to those people, and any woman would tell you that she would much rather place herself in the hands of a doctor under sterile conditions than to be placed in a motel room—

Judge Hughes: It might be dependent upon whether she had the money or not.

Mrs. Weddington: It might be, but for example, in John Hopkins, they are now doing abortions on an out patient basis for from $75 and $100. In most of the cases now the girls are raising usually $150, more generally $350 for the abortions that they are getting now, which is evidenced by the fact that the girls are coming in, having gone through that abortion and having to be treated.

Judge Goldberg: If the State had to pay for a good many of these abortions, would the State have any compelling interest in keeping the number down from an economic point of view?

Mrs. Weddington: The State would have more of an interest in not having to make the welfare payments to many of those children and their parents when they are later produced, than it would in denying the basic constitutional rights to those women.

I can also point out that Blue Cross has now come out and said that it will definitely consider and feels that it will probably pay medical benefits for abortions in Wisconsin.

Judge Goldberg: One more question—you think this statute is more vulnerable on Ninth Amendment grounds or on vagueness.

Mrs. Weddington: I believe it is more vulnerable on the Ninth Amendment basis.

Judge Goldberg: All right, thank you.

Mr. Bruner: Your Honor, I am Fred Bruner, and I am representing the Intervenor, Dr. Hubert Hallford.

I regret that Mrs. Weddington says on the Ninth Amendment because I was about to argue on the vagueness of the statute.

Judge Hughes: I think you should under the circumstances.

Mr. Bruner: Going back to Judge Hughes' remarks about Article 1196 of the State statute, the question of the exception to an abortion if it's procured or done by or attempted to be done by one on medical advice for the purpose of saving the life of the mother—that's what I'd like to limit my remarks to, and I think it goes without saying that any State law should precisely set out in plain language and intelligible language so that a man of common intelligence could understand the meaning of the law.

It's the position of Dr. Hallford, and I'd like to refer the Courts' attention to his uncontroverted affidavit attached

to my pleadings, that not only is this language vague and hard to understand for the man of common intelligence, but even doctors themselves cannot interpret the language of this statute, and in Dr. Hallford's affidavit he states that even hospitals and doctors cannot determine what they should or shouldn't do, what is permissible and what is not permissible under the language of this particular statute. He points out in his affidavit that a person who comes to a hospital in Dallas, Texas or in the State of Texas pregnant and is going to consult the hospital about the impending pregnancy, that they can't get a decision from the hospital. They sometimes move from one hospital to the other, they sometimes move from doctors' offices to other doctors' offices—it's more or less a passing of the buck, so that doctors themselves can't determine what their liability may or may not be under this particular section of the Texas Abortion Law.

Judge Hughes: Well, if the Court struck out the words "for the purpose of saving the life of the mother", would that make the whole statute constitutional?

Mr. Bruner: You mean, Your Honor, Section 1196 in its entirety?

Judge Hughes: No, just struck out the words "for the purpose of saving the life of the mother"?

Judge Goldberg: There's nothing in this Chapter that applies to an abortion procured or attempted by medical advice—period.

Mr. Bruner: All right—I don't think it would be, Your Honor, because of the fact that "medical advice" as written in this law can be interpreted by many different ways. What is medical advice? Who does it come from?

Judge Goldberg: Can you look it up in a book?

Mr. Bruner: You can't look it up in a book—a dictionary.

Judge Goldberg: Maybe you could look it up in a book by a layman—that might be medical advice, mightn't it?

Mr. Bruner: A layman could look up "medical advice" in a book and he could say, "Come here, young lady, I am a medical advisor and I want to abort you under this law in Texas."

Judge Hughes: But you don't certainly think it would be interpreted that way, do you?

Mr. Bruner: I wouldn't go that far, Your Honor, but it has been interpreted by some to mean people who are pharmacists, who are nurses, who are taxi cab drivers and things of that nature—have interpreted themselves to be one who has medical advice, so I don't want to speculate on what some individual might interpret, but it has been so interpreted in the past that way. So therefore we take the position that this language used in this statute of the State of Texas is vague, and a man of common intelligence can't interpret it. Therefore, under rights to due process under the Constitution of the United States, Article 1196 of the Abortion Law of the State of Texas is unconstitutional.

Going to the life of the mother part of the statute, I might add also before I get away from the medical advice, referring to Dr. Hallford's affidavit, he states in there that when a woman comes into his office and discusses with him an impending pregnancy, that he is afraid to talk to her about it because of this statute; that immediately there becomes a conflict of interest between the physician and the patient in that he's afraid he's going to be prosecuted for abortion, and she's there not worried about the prosecution part of it, she's there for her personal medical

reasons of having an abortion performed; and so then you get into the question of accessory before or after the fact of an abortion. Other doctors will not discuss it with other doctors about the matter of terminating a pregnancy.

Now, on the life of the mother, this part of it we contend—saving the life of the mother. "Saving"—some of the statutes, the *Belous* California statute uses the word "preserve". I assume that's synonymous with "save", and the Court held in the Belous case that that language of preserved and saved was vague and could not be interpreted by a man of common intelligence, and I believe that the Court in the District of Columbia dwelt upon that issue. There is a distinction, however, between those cases decided and the *Babbitz* case in Wisconsin in that the exceptions to the Wisconsin statute did use language of this nature. However, it did say that two physicians advised, the point being that the physicians would make the interpretation of whether it was medically permissible to abort the woman, and it would be upon the shoulders of the physicians and not upon the shoulders of the prosecutor.

Judge Goldberg: The constitutionality of 1196 has never been presented to the Court of Criminal Appeals, has it?

Mr. Bruner: There are no cases that we can find where in the Texas Court, the Texas Court of Criminal Appeals has decided upon the constitutionality. They have talked about it.

Judge Hughes: Has it ever been really raised—the constitutional point?

Mr. Bruner: Not on that particular point, Your Honor, not on 1196.

Mr. Merrill: Could I speak on that?

Mr. Bruner: Yes.

Mr. Merrill: Your Honor, in one case it was raised in the sense that there was a Motion to Quash The Indictment, and the Court just summarily said that the exception was constitutional and there was no evidence in the case about why an abortion was performed, and I think it was on medical grounds, and I have that and can give it to the Court.

Judge Hughes: Give it to us later.

Mr. Bruner: In closing, Your Honor, I want to answer, if I may, a question that Judge Goldberg asked Mrs. Weddington about if the fact that this Court knocked this law out and held it was unconstitutional, that it would open up the door for a woman to go out here in a garage or restroom or anywhere else—in a motel—and have an abortion performed. I think that the very fact that they have this Abortion law on the books of Texas has driven women to that sort of thing in the State today, and that if the Abortion Law of the State of Texas were declared unconstitutional, it would give these women the right, the constitutional right, to go to a doctor or go to a qualified person who has the right surgical instruments and have this matter done at their wishes, and I just wanted to say that in closing. Thank you.

Mr. Floyd: Your Honor, I am Jay Floyd, Assistant Attorney General for the State of Texas—

Mr. Merrill: If it please the Court, my name is Roy Merrill and I am one of the attorneys representing the Intervenor, Dr. Hallford. I'd like to cite the three cases that we could find that did deal with the Texas statute 1196. Of course there are numerous cases on the other Articles. One of them is *Link* versus *State* which is in the original Brief filed on behalf of the Doctor, 164 SW 987; another one is *Ex Parte Vick,* 292 SW 889; and the other

one is *Veevers* versus *State,* 354 SW2d 161. Now, in that case there was a Motion to Quash the indictment on the ground that the Indictment did not allege, that the abortion didn't come under the exception of 1196 and the Court held that that's a proper matter when it's raised as an affirmative defense and no need to quash the Indictment, which is directly related to the point I'd like to argue concerning 1196, that it is unconstitutional on the ground that it places the burden technically of introducing evidence on a Defendant licensed, practicing physician.

I think the Court and everyone here will agree that the State certainly could not pass a law making it a crime for a licensed, practicing physician to perform an abortion to save the life of a mother or where she would die within a few hours if the abortion wasn't performed and it is certainly not the law as it exists now. However, the State does not have any burden when it prosecutes a physician of introducing any evidence that the abortion—why it was performed, and I think when a doctor performs an operation or a procedure such as an abortion, there are two essential elements of the crime as to a doctor. One is that he did perform the abortion, and the other is that his purpose was unlawful. Surely you could not class it a crime just for a doctor to perform an abortion.

Concerning this matter, I think if this exception were viewed as if it were a presumption it would clearly be unconstitutional. If you had a statute saying it shall be unlawful for a physician to perform an abortion, it shall be presumed that the State shows an abortion was performed, that it was performed for an unlawful purpose then clearly those facts are more likely than not, and it would clearly fall, I submit, under the *Leary* decision that it must be substantially certain and it is more likely than not that the

presumption is valid or that the interference is valid. I'm sure the State will distinguish and say, "This is just an affirmative defense, it's not a presumption", and I would like to call one case not mentioned in the original Brief to the Courts' attention, being *Morrison* versus *California,* 291 U.S., and on page 83 the Court deals with strictly the burden of introducing evidence, and it concerned in a case in California being a crime for an alien to be in possession or own real property, and the statute merely provided that the State need only prove that he was in possession, and the burden was on him as a defense to show that he actually had citizenship, and the Court held that placing the burden upon that Defendant was a violation of due process, and in various other cases it implied it can be under the Fifth, Ninth, and the Fourteenth Amendments.

I think the *Leary* cases and the cases preceding them—*Trop* and *Gainey,* if read closely, deal with the problem of presumptions in the same manner in which the Court in *Morrison* dealt with the burden of proof.

Judge Hughes: I think we've had enough of this argument.

Mr. Floyd: Your Honor, I got out of line and I apologize to Counsel.

Judge Goldberg: That's all right.

Mr. Floyd: Your Honor, the validity of State statutes are in question, the State has an interest of course when those statutes are attacked; we have requested leave of the Court to respond to the pleadings and we have been granted that relief and leave, and we are here to present an argument on behalf of the State of Texas.

Your Honors, our first contention is that the parties in this lawsuit have no standing before this Court and that if this Court so decides that there is no controversy to be

decided. Now the fundamental aspect of standing, I think, is that the Court focuses its attention on the parties instead of the issues before the Court. This was brought out in the *Flast* versus *Cohen* case. Though the issue may be justiciable, if the parties have no standing, the Court will not go forward to decide that issue.

I am under the impression that Jane Roe no longer is seeking an abortion; that she has either had her baby or is having it—

Judge Goldberg: She may in the future want to have an abortion?

Mr. Floyd: Yes, but at the present time, Your Honor, I am speaking of.

Judge Goldberg: At the time she filed this suit—are we going to let the delay in the hearing of the case abort the case?

Mr. Floyd: Your Honor, I think the law is whether or not the party has standing at the time the issues are decided in the case.

Judge Goldberg: Well, a lot of these civil rights cases and school desegregation cases, I understand that some of the children are through college by the time they remand and remand and so forth, but go ahead with your argument.

Mr. Floyd: Then my point, Your Honor, is the fact that it is problematical if she will become pregnant in the future, and if so, whether or not she will want to abort the child that she is bearing at that particular time.

The Plaintiff Mary Doe is not pregnant at this time, by the Admissions in her Complaint.

Judge Hughes: If it's to be determined as of today, we don't know, do we?

Mr. Floyd: I have no Amended Complaint or anything of this nature, Your Honor, to indicate that she is pregnant at this time, or that—

Judge Goldberg: But she may want to engage in activities by which she'll become pregnant and maybe she will then want to have an abortion. Does she have any right to present the issue under those circumstances?

Mr. Floyd: But, Your Honor, aren't we becoming involved in contingencies—contingent events that may or may not occur in the future?

Judge Hughes: There's nothing contingent about the Doctor's difficulty, he's been charged and indicted and the case is pending.

Mr. Floyd: That is correct.

Judge Goldberg: And if he has standing, do we need more?

Mr. Floyd: You do not need more, Your Honor.

Of course each of these Plaintiffs has brought a class action and all others similarly situated must fall within or stand in the shoes of the Plaintiff, you might say.

Dr. Hallford's complaint, his Intervenor's complaint, alleges that he has been deprived of certain relationships with his patients, that is, discussing abortions and performing abortions; that his rights or his patient's [*sic*] rights are violated; that he desires to perform abortions in the future. Now, I will make note, Your Honors, for what it's worth to the Court that there may be an injection of monetary benefit in performing an abortion; that he's presently under indictment; that he did not bring this suit or intervene in this action until after the indictments had been handed down by the Dallas County Grand Jury.

Judge Goldberg: He might have presumed the State wouldn't go forward on an unconstitutional statute.

Mr. Floyd: I don't believe that the State can presume that they must go forward with it, it's their duty, I think, Your Honor.

Judge Goldberg: Well, if they came to the conclusion that it's unconstitutional, the statute was passed a long time ago, and they may not prosecute it.

Mr. Floyd: That is correct, they could—the State very easily could.

Judge Goldberg: Go ahead.

Mr. Floyd: Your Honor, we do not believe the parties have standing in this court, that they have not shown an actual controversy before this Court at this time; that this Court is being asked to render an advisory Opinion; that just because maybe there are common interests among the public does not mean that these parties have standing to bring this suit.

As to the matter of a substantial constitutional question—

Judge Goldberg: What would you do with a situation where there was no question about standing, but by the time it got to the Appellate Court it had been mooted because the Plaintiff had the baby? What are you going to do with that kind of situation?

Mr. Floyd: Your Honor, I can't say that they have standing because their standing depends upon a future, contingent event.

Judge Hughes: What would give them standing in a case like this to test the constitutionality of this statute? Apparently you don't think that anybody has standing?

Mr. Floyd: I think that if the matter is adjudicated as in the Vuitch case or else the statute is declared unconstitutional in a State Court, then this is where the standing would come in, not in the Federal Court, but this is where this matter could be resolved. Now, the Vuitch case is before the Supreme Court of the United States and Dr.

Hallford of course can attack the constitutionality of this statute in this present State proceedings.

The constitutional rights—I cannot perceive, Your Honors, how it would fall under religion, speech, or press of the First Amendment.

Judge Hughes: We agree with you on that.

Judge Goldberg: No—go to the Ninth Amendment and what about vagueness?

Mr. Floyd: It appears it is directed to the right of privacy under the Ninth Amendment, and I will not discuss the other constitutional amendments alleged, I think it's unnecessary. However, the Intervenor has contended that his right to practice medicine has been impaired or abridged, and we do not see that it has been. Maybe he cannot do all of the things he wants to do and what he considers to be the practice of medicine, but there has been no denial by him of his right to practice medicine. No one has attempted to deny him that right.

That the physician-client relationship has been impaired or abridged—such a relationship does exist, however, I think you can't stop there and say "the physician-client relationship", I think you have to go further and show some right under that relationship that has been impaired.

Now, Your Honors, they have raised a question of the equal protection of the laws, and I do not see that this is relevant.

Judge Goldberg: Skip it.

Mr. Floyd: They have raised the question of privacy, the fundamental right to choose, or the woman to choose whether or not she will bear a child, which goes to her privacy. Now of course Your Honors will discuss this more in detail, but I will point out here under that particular topic that in the Belous case, where this principle, I think,

was established or else followed, and then the Vuitch case, but going back to the Belous case, the Court went further there than to consider the fundamental right of a woman to choose whether or not to bear a child and a right to privacy, and stated further that the critical issue is not whether such rights, and they were enumerated and listed, many rights involving privacy, exist, but whether the State has a compelling interest in the regulation, or whether the regulation is necessary.

Now, Your Honors, there have been many, many arguments advanced as to when an embryo becomes a human being. There have been religious groups that have joined into this controversy, and it's my understanding, and I'm not setting forth the Catholic faith—

Judge Goldberg: This statute is applicable no matter when the embryo comes in to effect—at the first week?

Mr. Floyd: That is correct.

Judge Goldberg: I don't see how that's getting you anywhere.

Mr. Floyd: But the point is that the State's interest is that it may be a consideration of whether or not murder occurs, that is, if this embryo is considered a human being?

Judge Goldberg: You mean if the embryo is considered a human being the moment of pregnancy?

Mr. Floyd: Yes, Your Honor. Now, I'm not advocating this, I'm saying there's some controversy in regard to this, that at no matter what stage of the pregnancy, the embryo is a human being. There is controversy to that effect. Medical practitioners disagree and speaking of medical advances, we have now reached a point, I think, where a medical practitioner can operate on an unborn child, perform surgery.

The State must give considerations to these various interests and opinions in deciding whether or not it has an interest in the subject matter or a compelling interest in the subject matter.

Judge Goldberg: Well, the State here has asserted its compelling interest to the extent that it make any abortion under any condition practically illegal.

Mr. Floyd: Except to save the life of the mother.

Judge Goldberg: Well, yes, except that.

Mr. Floyd: That is correct.

Judge Hughes: But you don't know what that means—the case which you quoted held that that was too vague and indefinite—the Belous case, and knocked the statute out on that ground.

Mr. Floyd: That is correct—on the right of privacy—there's no question about that.

Judge Hughes: Well then your case isn't authority for your argument.

Mr. Floyd: No, the Belous case—I'm not saying it's authority, I'm getting to the right of privacy.

Judge Goldberg: The Vuitch case says this: "The asserted constitutional right of privacy. Here the unqualified right to refuse to bear children has limitations. Congress can—" it's Congress in this case because it's the District of Columbia and the State would be in the same situation. "Congress can undoubtedly regulate abortion practice in many ways, perhaps even establishing different standards at various phases of pregnancy, if its own legislative findings were made after a modern review of medical, social and constitutional problems presented."

That's the best statement that I can find in any of the cases for your position, but what I say to you, Sir, is that I don't see anything in the Texas statute that would form the basis for this sort of compelling interest.

Mr. Floyd: Well, Your Honor, that particular case—now, the Vuitch case, as I understand it, a Motion for a Hearing has been granted by the Supreme Court, and it is my understanding that that case went further than to preserve the life of the mother. It said to preserve the life and health of the mother. This is not an argument along that point, but of course this case has not been decided finally as yet, as the Court well understands.

The State of Texas is—there are many opinions on privacy, Your Honor, and I don't know whether privacy in my opinion—I'm speaking personally now, and I'm not speaking—

Judge Goldberg: Well, I think it's a bad word in this area, but apparently everybody wants to use it. I think it's something different from privacy, but I haven't come up with a phrase myself yet, but I just know "privacy" won't do, but I know what you're talking about.

Mr. Floyd: Well, it seems to me that privacy would mean that a person is entitled to be secluded, left alone.

Judge Goldberg: This is a right to make a decision about a completely subjective matter which only involves the individual, but we won't get into that.

Mr. Floyd: As to vagueness and uncertainty, Your Honor, I think looking at the Texas Abortion statute, I think the criteria would be what a man of ordinary intelligence would have to guess at the meaning, and I do not believe that anyone would have to guess at the meaning of this particular statute.

Judge Goldberg: What time factor are we going to talk about in saving the life of a mother? Would that be imminent or can the doctor say her life may be shortened by a decade?

Mr. Floyd: Your Honor, in my understanding, it's whether or not that it might result from the birth of this particular child, death might result from the birth of this particular child.

Judge Goldberg: Even though she might die a year later?

Mr. Floyd: Well, I can't say a projection into the future.

Judge Goldberg: It's a medical judgment, it could be a scientific judgment?

Mr. Floyd: Your Honor, I think all things could be possible, but I think they have to make a decision, and I think it's left up to a medical examiner to make this decision as to whether or not the mother's life is in danger as a result of the birth of this child.

Judge Goldberg: I think you have gone over your time, if you want your associate to have his time to make his presentation.

Mr. Tolle: If the Court please, my name is John Tolle, and I represent the Defendant Henry Wade.

Mr. Floyd got into areas I wish to discuss and I'm going to have to overlap a little bit on his argument. It seems they have a disagreement, we have one too. We are not arguing with Dr. Hallford's standing, this Defendant Wade is not, he is being prosecuted under the statute and if he hasn't got standing, nobody does, so I think we're clear on that.

I think as to the Plaintiff Roe bringing a class action, she probably has standing as a class, not herself any more than as a class.

We say that Mary Doe and Joe Doe—these are two prospective applications, however, I think as we set out in that very short Brief we filed, the State only has one interest and that is the protection of the life of the unborn

child. There's a lot of medical opinion on both sides of this issue, and I think that Mrs. Weddington in her argument in a sense upheld our position. We say that at some time in the life of that child before it's born, it becomes a living child. I don't know when and I don't think medical science knows exactly when. The article we cited is a recognized work, I believe, and is Grey's Anatomy for Attorneys.

Judge Goldberg: You do not think that a legitimate Judgment could be made, that even though on some technical definition there was life at this particular time, a medical Judgment could be made that there should be an abortion because the mother's health was in being and was in being for a number of years should be continued on a more equitable basis?

Mr. Tolle: It's possible that could be.

You're talking now about the State's right to regulate this field of human life, which is the termination of pregnancy. I believe that in itself gives the State the interest. The only remaining question is whether it is vague or indefinite. However, to answer your first question further, I don't believe there is any—I have not been able to find any firm body of medical opinion that says at what point in the life of an embryo fetus or unborn child or whatever you want to call it, that life occurs. This particular work I referred to says that in their opinion life occurs at conception. The old common-law rule was the term "quickening" which was at the time the mother could feel the child move. As the author of Grey's textbook on medicine pointed out, modern science is able now and at a much earlier age to determine things like fetal heartbeat and muscular movement—things which indicate a living organism of some kind. They refer to the human organism.

Our position is this basically, that the life of every person starts somewhere. Every person in this room at one time was the most primitive form of embryo. We say the State has got a right to protect life that is in being at whatever stage it may be in being, and if there is no absolute fact as to when life occurs, then it becomes, I think, for the purpose of public order, a legislative problem as to when they're going to set up an arbitrary time.

Judge Goldberg: But the statute didn't address itself to that.

Mr. Tolle: That's correct, Your Honor, it doesn't. It says "to save the life of the mother".

Judge Hughes: Suppose we struck out the phrase which we've discussed before—severed it—would that make the statute constitutional, assuming that that phrase does make it unconstitutional on account of its vagueness, would striking it out be a possibility and would it then be constitutional?

Mr. Tolle: I think if you struck it out, it wouldn't make it unconstitutional, it would make the statute virtually meaningless, if it could be done on medical advice—Hallford of course would have no complaint and I don't believe we would have any more controversy on it. I don't think it would be unconstitutional, no. I don't think it's necessary. I believe the statute is constitutional. I believe that when we're talking about rights, I think that the most persuasive right that the Plaintiffs urge as was held in the Babbitz case, and all the cases refer to it quite heavily, is the right of privacy, the Ninth Amendment right of privacy, for want of a better term, and there you get to the point where the State has to regulate conflicting rights—whether the State has got an interest in the life of the unborn child sufficient to regulate the woman's right to pri-

vacy. This is a very difficult question, and I think that is properly a legislative question.

Judge Hughes: Would you discuss the abstention doctrine as applied to this case?

Mr. Tolle: I haven't, Your Honor. Quite frankly, I believe that the Vuitch case and the Babbitz case—the ones that are presently in the process of going before the Supreme Court—I believe in each case, abstention, and as to this case, would not be proper for this reason. Those statutes are different in material aspects from ours. The Vuitch case is very material and one of the things that was struck down was this vague word of "to preserve the life or health" and I believe you could distinguish our case on that ground. The Wisconsin statute goes further than ours in establishing, I believe, a medical review system provided for an abortion, and I believe it says in the case that two doctors agreed that conclusive evidence was needed and prosecution can't occur.

I don't believe that those cases, except for the Ninth Amendment right, will be determining in this case. Now, of course, I think as far as the Ninth Amendment right goes, it will, because if the Supreme Court holds that the right of the female or the mother to privacy under the Ninth Amendment is superior to the right of a young fetus to survive, then of course that will foreclose this issue.

I think that our position is that that is a matter for legislative determination. I don't think a State has to have a law at all regulating abortion. I believe the field is such that it can regulate it constitutionally. I personally, and I think the State's position will be and it is, that the right

of that child to life is superior to that woman's right to privacy. That's basically our position on that.

If I may answer just briefly—of course I think vagueness has been gone over quite heavily in here. We say to preserve the life of the mother means to prevent her death. That's self-explanatory to me. If we're talking about what Dr. Hallford can understand, I can't speak for him. His affidavit refers to his opinion about what he understands and about what other people understand. It doesn't set out as a medical fact or as an absolute fact that other doctors don't understand. It talks about their opinion.

Judge Goldberg: Do you think medical advice can come from a book?

Mr. Tolle: I don't think so. I don't think it will ever be interpreted that way. I don't think there's a statute in the world you couldn't put some unconstitutional interpretation on it, if you look for a way to do it. I believe that this will be—if it ever is attacked and if the statute does stand—will not refer to advice from a book. No—I believe it's going to refer to advice from a doctor or a medical person qualified to give it.

As far as the last thing that was raised of touching very briefly this business about putting the burden on the Defendant to prove his innocence. Mr. Merrill cited two cases—one was Dr. Leary's case and the other one was the case from California preventing aliens from owning land. I think the distinction there is that in each of those cases the thing that was presumed was an element of the offense which the Government had to prove, whereas in this case—this case—our statute is in no way different from the Federal statute regulating tax evasion, 26 U.S.C. 7201.

Judge Goldberg: Or the Dyer Act cases—we have that every day.

Mr. Tolle: Yes—affirmative offenses are present in every case—every criminal prosecution. If the Government makes out a prima facie case, the Defendant has the burden of putting himself under the exception. I believe that answers that. Thank you.

Judge Goldberg: I'd like to ask Miss Coffee or Mrs. Weddington one question—suppose that the only Defendant in this case is enjoined? Where does that leave us with respect to the rest of the State of Texas?

Mrs. Weddington: Excuse me, would you repeat the question?

Judge Goldberg: Suppose the injunction is granted in this case against Henry Wade, District Attorney of Dallas County, every other District Attorney would be free to go ahead, would he?

Mrs. Weddington: It was my understanding that since the Attorney General's Office had chosen to come in and since they are now a party-defendant to the suit—

Judge Goldberg: How are they a party defendant?

Mrs. Weddington: Well, I thought by—

Judge Hughes: I don't believe they have intervened. Has the State intervened?

Mr. Floyd: No.

Judge Goldberg: I don't think so.

Mr. Tolle: If the Court please, I believe we can cite another example—in the Buchanan case, the Courts' injunction ran against Henry Wade only and I don't think it binds anybody else.

Judge Goldberg: Do you have any response to the question?

Mrs. Weddington: We goofed.

Judge Hughes: Miss Coffee, these two cases have not yet been consolidated by Order. Would you prepare one?

Miss Coffee: Yes, Your Honor.

Judge Goldberg: We appreciate very much your argument. We will take the matter under advisement. Thank you very much.

The Marshal: All rise, please.

Court is adjourned.

(These Proceedings Concluded)

[Certification by Court Reporter omitted in printing.]

Opinion of the District Court, Filed June 17, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action 3-3690-B

Civil Action 3-3691-C

[TITLE OMITTED IN PRINTING]

Before GOLDBERG, Circuit Judge, and HUGHES and TAYLOR, District Judges.

PER CURIAM:

Two similar cases are presently before the Court on motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In one action plaintiffs are John and Mary Doe, and in the other Jane Roe and James Hubert Hallford, M.D., intervenor.[1]

From their respective positions of married couple, single woman, and practicing physician, plaintiffs attack Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal

[1] On March 3, 1970, plaintiff Jane Roe filed her original complaint in CA-3-3690-B under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. She alleged jurisdiction to be conferred upon the Court by Title 28, United States Code, Sections 131, 1343, 2201, 2202, 2281, and 2284 and by Title 42, United States Code, Section 1983. On

Code,[2] hereinafter referred to as the Texas Abortion Laws. Plaintiffs allege that the Texas Abortion Laws deprive

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April 22, plaintiff Roe amended her complaint to sue "on behalf of herself and all others similarly situated."

On March 23, James Hubert Hallford, M.D., was given leave to intervene. Hallford's complaint recited the same constitutional and jurisdictional grounds as the complaint of plaintiff Roe. According to his petition for intervention, Hallford seeks to represent "himself and the class of people who are physicians, licensed to practice medicine under the laws of the State of Texas and who fear future prosecution."

On March 3, 1970, plaintiffs John and Mary Doe filed their original complaint in CA-3-3691-C. The complaint of plaintiffs Doe recited the same constitutional and jurisdictional grounds as had the complaint of plaintiff Roe in CA-3-3690 and, like Roe, plaintiffs Doe subsequently amended their complaint so as to assert a class action.

Plaintiffs Roe and Doe have adopted pseudonyms for purposes of anonymity.

[2] *Article 1191 Abortion*

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

Article 1192 Furnishing the Means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Article 1193 Attempt at Abortion

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Article 1194 Murder in Producing Abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Article 1196 By Medical Advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

married couples and single women of the right to choose whether to have children, a right secured by the Ninth Amendment.

Defendant challenges the standing of each of the plaintiffs to bring this action. However, it appears to the Court that Plaintiff Roe and plaintiff-intervenor Hallford occupy positions *vis-a-vis* the Texas Abortion Laws sufficient to differentiate them from the general public. *Compare Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), and *Griswold* v. *Connecticut,* 381 U.S. 479 (1965),[3] *with Frothingham* v. *Mellon,* 262 U.S. 447 (1923). Plaintiff Roe filed her portion of the suit as a pregnant woman wishing to exercise the asserted constitutional right to choose whether to bear the child she was carrying. Intervenor Hallford alleged in his portion of the suit that, in the course of daily exercise of his duty as a physician and in order to give his patients access to what he asserts to be their constitutional right to choose whether to have children, he must act so as to render criminal liability for himself under the Texas Abortion Laws a likelihood. Dr. Hallford further alleges that Article 1196 of the Texas Abortion Laws is so vague as to deprive him of warning of what produces criminal liability in that portion of his medical practice and consultations involving abortions.

On the basis of plaintiffs' substantive contentions,[4] it appears that there then exists a "nexus between the status asserted by the litigant[s] and the claim[s] [they present]." *Flast* v. *Cohen,* 392 U.S. 83, 102 (1968).

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[3] By the authority of *Griswold,* Dr. Hallford has standing to raise the rights of his patients, single women and married couples, as well as rights of his own.

[4] "[I]n ruling on standing, it is both appropriate and necessary to look to the substantive issues * * * to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen,* 392 U.S. 83, 102 (1968).

Further, we are satisfied that there presently exists a degree of contentiousness between Roe and Hallford and the defendant to establish a "case of actual controversy" as required by Title 28, United States Code, Section 2201. *Golden* v. *Zwickler*, 394 U.S. 103 (1969).

Each plaintiff seeks as relief, *first*, a judgment declaring the Texas Abortion Laws unconstitutional on their face and, *second*, an injunction against their enforcement. The nature of the relief requested suggests the order in which the issues presented should be passed upon.[5] Accordingly, we see the issues presented as follows:

I. Are plaintiffs entitled to a declaratory judgment that the Texas Abortion Laws are unconstitutional on their face?

II. Are plaintiffs entitled to an injunction against the enforcement of these laws?

I.

Defendants have suggested that this Court should abstain from rendering a decision on plaintiffs' request for a declaratory judgment. However, we are guided to an opposite conclusion by the authority of *Zwickler* v. *Koota*, 389 U.S. 241, 248-249 (1967):

> "The judge-made doctrine of abstention • • • sanctions • • • escape only in narrowly limited 'special circumstances.' • • • One of the 'special circumstances • • • is the susceptibility of a state statute of a construction by the state courts that would avoid or modify the constitutional question."

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[5] *Zwickler* v. *Koota*, 389 U.S. 241, 254 (1967); *Cameron* v. *Johnson*, 390 U.S. 611, 615 (1968).

The Court in *Zwickler* v. *Koota* subsequently quoted from *United States* v. *Livingston,* 179 F.Supp. 9, 12-13 (E.D.S.C. 1959):

> "Regard for the interest and sovereignty of the state and reluctance needlessly to adjudicate constitutional issues may require a federal District Court to abstain from adjudication if the parties may avail themselves of an appropriate procedure to obtain state interpretation of state laws requiring construction. • • • The decision in [Harrison v. N.A.A.C.P., 369 U.S. 167], however, is not a broad encyclical commanding automatic remission to the state courts of all federal constitutional questions arising in the application of state statutes. • • • Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit." [6]

Inasmuch as there is no possibility that state question adjudication in the courts of Texas would eliminate the necessity for this Court to pass upon plaintiffs' Ninth Amendment claim or Dr. Hallford's attack on Article 1196 for vagueness, abstention as to their request for declaratory judgment is unwarranted. *Compare Chicago* v. *Atchison T. & S.F.R. Co.,* 357 U.S. 77, 84 (1958), *with Reetz* v. *Bozanich,* 38 U.S.L.W. 4170, —— U.S. —— (1970).

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[6] 389 U.S. at 250-251. (Citations omitted.)

On the merits, plaintiffs argue as their principal contention[7] that the Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment,[8] to choose whether to have children. We agree.

The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals. The manner by which such interests are secured by the Ninth Amendment is illustrated by the concurring opinion of Mr. Justice Goldberg in *Griswold* v. *Connecticut,* 381 U.S. 479, 492 (1965):

> "[T]he Ninth Amendment shows a belief of the Constitution's authors that *fundamental* rights exist that are not expressly enumerated in the first eight amendments and intent that the list of rights included there not be deemed exhaustive." • • •
>
> "The Ninth Amendment simply shows the intent of the Constitution's authors that other *fundamental* personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments." (Emphasis added.)[9]

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[7] Aside from their Ninth Amendment and vagueness arguments, plaintiffs have presented an array of constitutional arguments. However, as plaintiffs conceded in oral argument, these additional arguments are peripheral to the main issues. Consequently, they will not be passed upon.

[8] "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."

[9] At 492 the opinion states: "In determining which rights are fundamental, judges are not left at large to decide cases in light

Relative sanctuaries for such "fundamental" interests have been established for the family,[10] the marital couple,[11] and the individual.[12]

Freedom to choose in the matter of abortions has been accorded the status of a "fundamental" right in every case coming to the attention of this Court where the question has been raised. *Babbitz* v. *McCann,* —— F.Supp. —— (E.D.Wis. 1970); *People* v. *Belous,* 80 Cal. Rptr. 354, 458 P.2d 194, (Cal. 1969); *State* v. *Munson,* —— (South Dakota Circuit Court, Pennington County, April 6, 1970). *Accord United States* v. *Vuitch,* 305 F.Supp. 1032 (D. D.C. 1969). The California Supreme Court in *Belous* stated:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this Court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." 458 P.2d at 199.

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of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.' *Snyder* v. *Massachusetts,* 291 U.S. 97, 105. The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . .' *Powell* v. *Alabama,* 287 U.S. 45, 67."

[10] *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923); and *Prince* v. *Massachusetts,* 321 U.S. 158 (1944).

[11] *Loving* v. *Commonwealth,* 388 U.S. 1 (1967); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); and *Buchanan* v. *Batchelor,* —— F.Supp. —— (N.D. Tex. 1970).

[12] *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); and *Stanley* v. *George,* 394 U.S. 557 (1969).

The District Court in *Vuitch* wrote:

> "There has been • • • an increasing indication in the decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy." 305 F. Supp. at 1035.

Writing in *Griswold* v. *Connecticut, supra,* and the decisions leading up to it, former Associate Justice Tom C. Clark observed:

> "The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution." [13]

Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the

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[13] Religion, Morality, and Abortion: A Constitutional Appraisal, 2 *Loyola Univ. L. Rev.* 1, 8 (1969). Mr. Justice Clark goes on to write, ". . . abortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent contraception, why can he not nullify that conception when prevention has failed?" *Id.* at 9.

burden is on the defendant to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest.[14] The defendant has failed to meet this burden.

To be sure, the defendant has presented the Court with several compelling justifications for state presence in the area of abortions. These include the legitimate interests of the state in seeing to it that abortions are performed by competent persons and in adequate surroundings. Concern over abortion of the "quickened" fetus may well rank as another such interest. The difficulty with the Texas Abortion Laws is that, even if they promote these interests,[15] they far outstrip these justifications in their impact by prohibiting *all* abortions except those performed "for the purpose of saving the life of the mother."[16]

It is axiomatic that the fact that a statutory scheme serves permissible or even compelling state interests will not save it from the consequences of unconstitutional overbreadth. *E.g., Thornhill* v. *Alabama,* 310 U.S. 88 (1940);

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[14] "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling,' *Bates* v. *Little Rock,* 361 U.S. 516, 524." *Griswold* v. *Connecticut,* 381 U.S. 479, 497 (1965) (Concurring opinion of Mr. Justice Goldberg). *See also Kramer* v. *Union Free School District,* 395 U.S. 621 (1969).

[15] It is not clear whether the Texas laws presently serve the interests asserted by the defendant. For instance, the Court gathers from a reading of the challenged statutes that they presently would permit an abortion "for the purpose of saving the life of the mother" to be performed *anywhere* and quite possibly by *one other than a physician.*

[16] Article 1196.

Buchanan v. *Batchelor,* —— F.Supp. —— (N.D. Tex. 1970). While the Ninth Amendment right to choose to have an abortion is not unqualified or unfettered, a statute designed to regulate the circumstances of abortions must restrict its scope to compelling state interests. There is unconstitutional overbreadth in the Texas Abortion Laws because the Texas Legislature did not limit the scope of the statutes to such interests. On the contrary, the Texas statutes, in their monolithic interdiction, sweep far beyond any areas of compelling state interest.

Not only are the Texas Abortion Laws unconstitutionally overbroad, they are also unconstitutionally vague. The Supreme Court has declared that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). "No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453 (1929). *See also Giaccio* v. *Pennsylvania,* 382 U.S. 399, 402-403 (1966). Under this standard the Texas statutes fail the vagueness test.

The Texas Abortion Laws fail to provide Dr. Hallford and physicians of his class with proper notice of what acts in their daily practice and consultation will subject them to criminal liability. Article 1196 provides:

> "Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

It is apparent that there are grave and manifold uncertainties in the application of Article 1196. How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered.

The grave uncertainties in the application of Article 1196 and the consequent uncertainty concerning criminal liability under the related abortion statutes are more than sufficient to render the Texas Abortion Laws unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

II.

We come finally to a consideration of the appropriateness of plaintiffs' request for injunctive relief. Plaintiffs have suggested in oral argument that, should the Court declare the Texas Abortion Laws unconstitutional, that decision would of itself warrant the issuance of an injunction against state enforcement of the statutes. However, the Court is of the opinion that it must abstain from granting the injunction.

Clearly, the question whether to abstain concerning an injunction against the enforcement of state criminal laws is divorced from concerns of abstention in rendering a declaratory judgment. Quoting from *Zwickler* v. *Koota*,

> "[A] request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against enforcement of that statute. We hold that a federal district court has the duty to decide the appropriateness and merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." 389 U.S. at 254.

The strong reluctance of federal courts to interfere with the process of state criminal procedure was reflected in *Dombrowski* v. *Pfister,* 380 U.S. 479, 484-485 (1965):

> "[T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

This federal policy of non-interference with state criminal prosecutions must be followed except in cases where "statutes are justifiably attacked on their face as abridging free expression," or where statutes are justifiably attacked "as applied for the purpose of discouraging protected activities." *Dombrowski* v. *Pfister,* 380 U.S. at 489-490.

Neither of the above prerequisites can be found here. While plaintiffs' first substantive argument rests on notions of privacy which are to a degree common to the First

and Ninth Amendments, we do not believe that plaintiffs can seriously argue that the Texas Abortion Laws are vulnerable "on their face as abridging free expression." [17] Further, deliberate application of the statutes "for the purpose of discouraging protected activities" has not been alleged. We therefore conclude that we must abstain from issuing an injunction against enforcement of the Texas Abortion Laws.

Conclusion

In the absence of any contested issues of fact, we hold that the motions for summary judgment of the plaintiff Roe and plaintiff-intervenor Hallford should be granted as to their request for declaratory judgment. In granting declaratory relief, we find the Texas Abortion Laws unconstitutional for vagueness and overbreadth, though for the reasons herein stated we decline to issue an injunction. We need not here delineate the factors which could qualify the right of a mother to have an abortion. It is sufficient to state that legislation concerning abortion must address itself to more than a bare negation of that right.

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[17] "[T]he door is not open to all who would test the validity of state statutes or conduct a federally supervised pre-trial of a state prosecution by the simple expedient of alleging that the prosecution somehow affects First Amendment rights." *Porter* v. *Kimzey*, 309 F.Supp. 993, 995 (N.D. Ga. 1970).

Judgment of the District Court, Filed June 17, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action 3-3690-B

Civil Action 3-3691-C

[TITLE OMITTED IN PRINTING]

This action came on for hearing on motions for summary judgment before a three-judge court composed of Irving L. Goldberg, Circuit Judge, Sarah T. Hughes and W. M. Taylor, Jr., District Judges. The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In one action plaintiffs are John and Mary Doe, husband and wife, and in the other Jane Roe and James Hubert Hallford, M.D., intervenor.

The case having been heard on the merits, the Court, upon consideration of affidavits, briefs and arguments of counsel, finds as follows:

Findings of Fact

(1) Plaintiff Jane Roe, plaintiff-intervenor James Hubert Hallford, M.D. and the members of their respective classes have standing to bring this lawsuit.

(2) Plaintiffs John and Mary Doe failed to allege facts sufficient to create a present controversy and therefore do not have standing.

(3) Articles 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code, hereinafter referred to as the Texas Abortion Laws, are so written as to deprive single women and married persons of the opportunity to choose whether to have children.

(4) The Texas Abortion Laws are so vaguely worded as to produce grave and manifold uncertainties concerning the circumstances which would produce criminal liability.

Conclusions of Law

(1) This case is a proper one for a three-judge court.

(2) Abstention, concerning plaintiffs' request for a declaratory judgment, is unwarranted.

(3) The fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment.

(4) The Texas Abortion Laws infringe upon this right.

(5) The defendant has not demonstrated that the infringement of plaintiffs' Ninth Amendment rights by the Texas Abortion Laws is necessary to support a compelling state interest.

(6) The Texas Abortion Laws are consequently void on their face because they are unconstitutionally overbroad.

(7) The Texas Abortion Laws are void on their face because they are vague in violation of the Due Process Clause of the Fourteenth Amendment.

(8) Abstention, concerning plaintiffs' request for an injunction against the enforcement of the Texas Abortion Laws is warranted.

It is therefore ORDERED, ADJUDGED and DECREED that: (1) the complaint of John and Mary Doe be dismissed; (2) the Texas Abortion Laws are declared void on their face for unconstitutional overbreadth and for vagueness; (3) plaintiffs' application for injunction be dismissed.

Dated this the 17 day of June, 1970.

IRVING L. GOLDBERG
United States Circuit Judge

SARAH T. HUGHES
United States District Judge

W. M. TAYLOR, JR.
United States District Judge

Notice of Appeal by Plaintiffs Jane Roe, John Doe, Mary Doe, and James Hubert Hallford, M.D., From the Judgment of the District Court to the Supreme Court of the United States, Filed With the District Court August 17, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Actions Nos. 3-3690-B and 3-3691-C

[TITLE OMITTED IN PRINTING]

Notice is hereby given that Jane Roe, Plaintiff, John Doe, Plaintiff, and Mary Doe, Plaintiff, as well as James Hubert Hallford, M.D., Intervenor, Appellants, hereby appeal to the Supreme Court of the United States from that part of the final judgment entered in the above causes on the 17th day of June, 1970, in favor of Defendant Henry Wade, and Responding Party Defendant, State of Texas, wherein the Court denied all injunctive relief prayed for by said Plaintiffs and Intervenor.

Notice is also given that John Doe and Mary Doe, Plaintiffs, Appellants, hereby appeal to the Supreme Court of the United States from that part of the final judgment entered in the above cause on the 17th day of June, 1970 in favor of Defendant, Henry Wade, and Responding Party Defendant, State of Texas, wherein the Court denied the standing of John Doe and Mary Doe to attack the con-

stitutionality of the Texas Abortion Laws, Articles 1191, 1192, 1193, 1194 and 1196, Texas Penal Code.

This appeal is taken pursuant to Title 28, U.S.C., Section 1253.

I.

The Clerk will please prepare a transcript of the record in these causes, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

A. All pleadings of the parties in these causes including all briefs in support of the Plaintiffs' and Intervenor's pleadings.

B. The court reporter's transcription of the proceedings before the Court.

C. All evidentiary items on file in this cause including depositions, stipulations and request for admissions and replies thereto, if any.

D. All orders of the Court.

II.

The following questions are presented by this appeal:

A. Whether the Plaintiffs John Doe and Mary Doe had standing to challenge the constitutionality of Articles 1191, 1192, 1193, 1194, and 1196, Texas Penal Code?

B. Whether the Plaintiffs and Intervenor were entitled to a permanent injunction restraining Defendant Henry Wade from enforcing Articles 1191, 1192, 1193, 1194, and 1196, Texas Penal Code?

By Linda N. Coffee
Attorney for Plaintiffs John Doe, Mary Doe and Jane Roe
2130 First National Bank Bldg.
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By Fred Bruner
Attorney for Intervenor James Hubert Hallford, M.D.
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[Certificate of Service omitted in printing.]

Notice of Appeal by Defendant State of Texas From the Judgment of the District Court to the Supreme Court of the United States, Filed With the District Court August 17, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Actions Nos. 3-3690-B and 3-3691-C

[TITLE OMITTED IN PRINTING]

Notice is hereby given that the State of Texas, Responding Party Defendant, Appellant, hereby appeals to the Supreme Court of the United States from that part of the final judgment entered in the above causes on the 17th day of June, 1970, in favor of Plaintiffs, Jane Roe, John Doe and Mary Doe, and Intervenor, James Hubert Hallford, M.D., and against the named Defendant, Henry Wade, and Responding Party Defendant, State of Texas, wherein the Court granted summary declaratory relief finding the Texas Abortion Laws, Articles 1191, 1192, 1193, 1194 and 1196, Texas Penal Code, unconstitutional.

This appeal is taken pursuant to Title 28, U.S.C., Section 1253.

I.

The Clerk will please prepare a transcript of the record in these causes, for transmission to the Clerk of the Su-

preme Court of the United States, and include in said transcript the following:

A. All pleadings of the parties in these causes including all briefs in support of the State of Texas' pleadings.

B. The court reporter's transcription of the proceedings before the Court.

C. All evidentiary items on file in this cause including depositions, stipulations and request for admissions and replies thereto, if any.

D. All orders of the Court.

II.

The following questions are presented by this appeal:

A. Whether the Plaintiffs and Intervenor had standing to challenge the constitutionality of Articles 1191, 1192, 1193, 1194 and 1196, Texas Penal Code?

B. Whether the Plaintiffs and Intervenor failed to state a claim upon which relief could be granted for the reason that they failed to plead facts which raised any substantial constitutional question?

C. Whether the Plaintiffs and Intervenor failed to state a claim upon which relief could be granted for the reason that they failed to show that they suffered or will suffer any irreparable injury and that they had no adequate remedy at law?

D. Whether Intervenor, James Hubert Hallford, M.D.'s, Complaint is barred by 28 U.S.C. 2283?

E. Whether, as held by the Court, Article 1191, Texas Penal Code, is unconstitutional?

F. Whether, as held by the Court, Article 1192, Texas Penal Code, is unconstitutional?

G. Whether, as held by the Court, Article 1193, Texas Penal Code, is unconstitutional?

H. Whether, as held by the Court, Article 1194, Texas Penal Code, is unconstitutional?

I. Whether, as held by the Court, Article 1196, Texas Penal Code, is unconstitutional?

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant to the
Attorney General

ALFRED WALKER
Executive Assistant to the
Attorney General

ROBERT C. FLOWERS
Assistant Attorney General

By ROBERT C. FLOWERS

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Austin, Texas 78711

[Certificate of Service omitted in printing.]

Notice of Appeal by Plaintiff Jane Roe From the Judgment of the District Court to the United States Court of Appeals for the Fifth Circuit, Filed With the District Court July 24, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. 3-3690-B

Civil Action No. 3-3691-C

[TITLE OMITTED IN PRINTING]

Notice is hereby given that JANE ROE, Plaintiff above named, appeals to the United States Court of Appeals for the Fifth Circuit from that portion of the final judgment entered in this action on the 17th day of June, 1970, denying the injunctive relief prayed for in Plaintiff's Complaint.

July 24, 1970.

By LINDA N. COFFEE
2130 First National Bank Bldg.
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Attorney for Plaintiff Jane Roe

Notice of Appeal by Plaintiff-Intervenor James Hubert Hallford, M.D., From the Judgment of the District Court to the United States Court of Appeals for the Fifth Circuit, Filed With the District Court July 23, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. 3-3690-B

Civil Action No. 3-3691-C

[TITLE OMITTED IN PRINTING]

Notice is hereby given that JAMES HUBERT HALLFORD, M.D., Intervenor and Plaintiff above named, appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 17th day of June, 1970.

July 23, 1970

By FRED BRUNER
DAUGHERTY, BRUNER, LASTELICK and ANDERSON
1130 Mercantile Bank Building
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Attorneys for Intervenor and Plaintiff James Hubert Hallford, M.D.

Notice of Appeal by Defendant Wade From the Judgment of the District Court to the United States Court of Appeals for the Fifth Circuit, Filed With the District Court July 10, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. 3-3690-B

[TITLE OMITTED IN PRINTING]

Notice is hereby given that HENRY WADE, Criminal District Attorney of Dallas County, Texas, defendant above named, and THE STATE OF TEXAS, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 17th day of June, 1970.

July 9, 1970.

CRAWFORD C. MARTIN
Attorney General of the
State of Texas
Austin, Texas

HENRY WADE
Criminal District Attorney
Dallas County, Texas

JOHN B. TOLLE
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202
Attorney for Defendant,
Henry Wade

Motion of Plaintiffs Roe, Doe, and Hallford to Hold Appeal to Fifth Circuit by Defendant Wade in Abeyance Pending Decision by the Supreme Court of the United States, Filed October 13, 1970

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30329

[TITLE OMITTED IN PRINTING]

I. INTRODUCTION

The present appeal to this Court was taken by Appellant Wade from a declaratory judgment rendered below by a statutory three-judge federal district court that the Texas Abortion Laws violate the federal constitution by reason of unconstitutional vagueness and overbreadth. The judgment below, while granting declaratory relief, denied an injunction against future enforcement of the aforesaid statutes. From that portion of the judgment, Appellees here have taken an appeal directly to the Supreme Court of the United States pursuant to 28 U.S.C. §1253 (1964 ed.). Appellees make the present motion to hold the appeal in abeyance pending disposition by the Supreme Court. In the event that the Supreme Court's action allows the appeal here to go forward, Appellee respectfully requests an additional 20 days time within which to file a brief, and leave to file a brief of 50 pages.

II. Reasons for Holding Appeal in Abeyance

Title 28, U.S. Code §1253, authorizes an appeal from a three-judge district court order "granting or denying . . . an interlocutory or permanent injunction . . . ." The decision below denied such an injunction. While it is unusual that declaratory relief is granted, and an injunction denied, there have been such cases from time to time in the past, and the Supreme Court has heard such appeals. *See, e.g., Carter* v. *Jury Comm'n of Greene County,* 396 U.S. 320, 328 (1970); *Williams* v. *Rhodes,* 393 U.S. 23, 26-28 (1968). It is the action on the injunction which governs appealability.

When the appeal goes up properly, the entire case is opened for review. As *Dandridge* v. *Williams,* 397 U.S. 471 (1970) teaches:

> "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment . . . ." 397 U.S. at 475 n. 6.

Hence Appellant Wade may contest the declaratory judgment in the Supreme Court by way of defense to the propriety of not granting an injunction. Wade is in no way prejudiced by the holding of the present appeal in abeyance. He need do little more than change the heading on the brief already submitted to this Court.

III. Relief Requested

Accordingly, Appellee respectfully requests the following:

(1) That the present appeal be held in abeyance pending disposition of this case by the Supreme Court of the United States, in an appeal filed by Appellee (See Jurisdictional Statement attached hereto);

(2) That the record on this appeal be certified to the District Court for transmission to the Supreme Court of the United States for use in the appeal of this case docketed there as No. 808, October 1970 Term;

(3) That in the event this appeal is ultimately allowed to go forward, Appellee be granted an additional 20 days within which to file a brief, and that leave be granted to file a printed brief of 50 pages length, exclusive of indices and appendices.

Respectfully submitted,

ROY LUCAS
Four Patchin Place
New York, N.Y. 10011
Attorney for Appellees

[Affidavit of Service by mail and Jurat omitted in printing.]

Order of United States Court of Appeals for the Fifth Circuit Granting Motion of Plaintiffs Roe, Doe, and Hallford to Hold Appeal by Defendant Wade in Abeyance Pending Decision by the Supreme Court of the United States, Filed October 29, 1970

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30329

JANE ROE,

Plaintiff-Appellee-Cross Appellant,

versus

HENRY WADE, *et al.,*

Defendant-Appellant-Cross Appellee,

versus

JAMES HUBERT HALLFORD, M.D.,

Intervenor-Appellee-Cross Appellant.

JOHN DOE and MARY DOE,

Plaintiffs,

versus

HENRY WADE,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

IT IS ORDERED that appellees' motion to hold appeal in abeyance pending the decision of the United States Supreme Court, in this cause, is hereby GRANTED.

JOHN C. GODBOLD
United States Circuit Judge

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By BRENDA H. BONIS
Deputy
New Orleans, Louisiana
Oct 28 1970

(SEAL)